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In the Supreme Court of the United States

OCTOBER TERM, 1980

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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v.

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, ET AL.*

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QUESTION PRESENTED

Whether the United States Navy's alleged plan to store nuclear weapons in an ammunition storage facility on the island of Oahu, Hawaii must be the subject of a publicly-disclosed "hypothetical" environmental impact statement under the National Environmental Policy Act of 1969, even though such a statement of necessity would reveal military secrets.

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* In addition to Secretary Weinberger, the petitioners are John F. Lehman, Jr., Secretary of the Navy; Thomas P. Hayward, Chief of Naval Operations; Stanley J. Anderson, COMNAV Base Pearl Harbor; and Donald C. Davis, Commander-in-Chief of the Pacific Fleet. In addition to Catholic Action of Hawaii/Peace Education Project, and a second organization, Life of the Land, the respondents include James Albertini; Ian Yonge Lind; Eileen Belton; Peter Tagalog; Roger Sheetz; Edward Casey; and Nora Ogawa.

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The Solicitor General, on behalf of the Secretary of Defense, the Secretary of the Navy, and the other federal officials named as defendants herein, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-7a) and the opinion of the district court (App. D, *infra*, 10a-15a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 8a) was filed on July 17, 1980. An order denying a petition for rehearing (App. C, *infra*, 9a) was filed on October 10, 1980. On January 5, 1981, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including February 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. 4332, reads, in pertinent part:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
>
> * * * * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

2. The Atomic Energy Act of 1946, as amended, 42 U.S.C. 2011 *et seq.*, provides, in pertinent part:

42 U.S.C. 2014.

* * * * *

(y) The term "Restricted Data" means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 2162 of this title.

* * * * *

42 U.S.C. 2161.

It shall be the policy of the Commission to control the dissemination and declassification of Restricted Data in such a manner as to assure the common defense and security. Consistent with such policy, the Commission shall be guided by the following principles:

(a) Until effective and enforceable international safeguards against the use of atomic energy for destructive purposes have been established by an international arrangement, there shall be no exchange of Restricted Data with other nations except as authorized by section 2164 of this title; and

(b) The dissemination of scientific and technical information relating to atomic energy should be permitted and encouraged so as to provide that free interchange of ideas and criticism which is essential to scientific and industrial progress and public understanding and to enlarge the fund of technical information.

42 U.S.C. 2162.

(a) *Periodic determination*

The Commission shall from time to time determine the data, within the definition of Restricted Data, which can be published without undue risk to the common defense and security and shall thereupon cause such data to be declassified and removed from the category of Restricted Data.

(b) *Continuous review*

The Commission shall maintain a continuous review of Restricted Data and of any Classification Guides issued for the guidance of those in the atomic energy program with respect to the areas of Restricted Data which have been declassified in order to determine which information may be declassified and removed from the category of Restricted Data without undue risk to the common defense and security.

(c) *Joint determination on atomic weapons; Presidential determination on disagreement*

In the case of Restricted Data which the Commission and the Department of Defense jointly determine to relate primarily to the military utilization of atomic weapons, the determination that such data may be published without constituting an unreasonable risk to the common defense and security shall be made by the Commission and the Department of Defense jointly, and if the Commission and the Department of Defense do not agree, the determination shall be made by the President.

(d) *Removal from Restricted Data category*

The Commission shall remove from the Restricted Data category such data as the Commission and the Department of Defense jointly determine relates primarily to the military utilization of atomic weapons and which the Commission and Department of Defense jointly determine can be adequately safeguarded as defense information: *Provided, however,* That no such data so removed from the Restricted Data category shall be transmitted or otherwise made available to any nation or regional defense organization, while such data remains defense information, except pursuant to an agreement for co-operation entered into in accordance with section 2164(b) of this title.

(e) *Joint determination of the atomic energy programs*

The Commission shall remove from the Restricted Data category such information concerning the atomic energy programs of other nations as the Commission and the Director of

Central Intelligence jointly determine to be necessary to carry out the provisions of section 403(d) of title 50 and can be adequately safeguarded as defense information.

* * * * *

42 U.S.C. 2277.

Whoever, being or having been an employee or member of the Commission, a member of the Armed Forces, an employee of any agency of the United States, or being or having been a contractor of the Commission or of an agency of the United States, or being or having been an employee of a contractor of the Commission or of an agency of the United States, or being or having been a licensee of the Commission, or being or having been an employee of a licensee of the Commission, knowingly communicates, or whoever conspires to communicate or to receive, any Restricted Data, knowing or having reason to believe that such data is Restricted Data, to any person not authorized to receive Restricted Data pursuant to the provisions of this chapter or under rule or regulation of the Commission issued pursuant thereto, knowing or having reason to believe such person is not so authorized to receive Restricted Data shall, upon conviction thereof, be punishable by a fine of not more than $2,500.

STATEMENT

1. During the early 1970's, many Hawaiians protested against the alleged storage of nuclear weapons at the Waikele branch of the Lualualei Naval Magazine on the island of Oahu, near Waipahu. They contended that the moving of nuclear weapons to and from the base by truck and helicopter, as well as the storage of such weapons at the base, constituted a hazard to all who lived in the heavily popu-

lated area surrounding Waikele. The Department of the Navy neither admitted nor denied that nuclear weapons were being stored at Waikele since information relating to whether or not an installation is a storage site for nuclear weapons is classified.[1]

In 1974 or 1975, Navy officials undertook to transfer the ammunition and weapons stored at Waikele and elsewhere on Oahu tc the more remote West Loch branch of the Lualualei Naval Magazine, which had been used by the Navy for general storage since 1942 and for ordnance storage since 1959. The transfer to West Loch of additional ordnance required the construction there of additional magazines and associated buildings, all of which were duly authorized by Acts of Congress.

In 1975, the Department of the Navy prepared an environmental impact assessment (App. F, *infra*, 17a-26a) of how, if at all, the relocation of West Loch of the Waikele functions would affect the environment.[2] This assessment, which made no mention of nuclear weapons, concluded that the construction of 48 earth covered magazines and associated buildings and the provision of security for those buildings would have no significant environmental impact. The assessment also concluded that "[t]here are no known significant species [of plants or animals] on the [construction] site" (App. F, *infra*, 20a) and that the nearby Okiokiolepe fish pond (which is listed on the National Register of Historic Places) would not be

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[1] See pages 12-15, *infra*.

[2] The document prepared in 1975 was not, strictly speaking, an environmental impact "assessment". It was, and remains, classified. In June of 1977, that document was revised, and a portion of it was declassified and released to the public as an environmental impact assessment. The declassified, publicly-available assessment is reprinted at Appendix F, *infra*.

affected. Consequently, no formal environmental impact statement was prepared at the construction stage. Three years later, the Department of the Navy prepared a "candidate" or generic environmental impact statement on "Nuclear Aspects of Naval Systems Storage" (App. G, *infra*, 27a-35a) that discussed in general terms, without reference to any specific storage site or surrounding locality, whether nuclear accidents could or were likely to occur, whether a nuclear accident could or would be likely to release radiation, and the extent to which stored nuclear warheads release low-level radioactive emissions.

In March of 1977, a contract was let for the construction of 30 of the projected 48 magazines. In April 1978, another contract was let for the remaining magazines, security fences, a guard house and other facilities.

2. In March of 1978, several groups and individuals who live near or engage in recreational activity in and around West Loch and who allege that the storage facility at West Loch is destined to house nuclear warheads, filed this action to enjoin the Secretary of Defense and various Navy officials from expanding the facility until they had complied with, *inter alia*, the requirements of the National Environmental Policy Act of 1969 (NEPA), the Endangered Species Act of 1973, and the National Historic Preservation Act of 1966.

Following a hearing on the merits, the district court concluded (App. D, *infra*, 10a-15a) that the proposed activity does not violate the latter two statutes. With respect to NEPA, the court held that although the construction and use of the storage facilities at West Loch would constitute major fed-

eral action within the meaning of Section 102 of NEPA, complete compliance with the Act was not possible since an enivronmental impact statement would include a discussion of the presence, number and locations of nuclear weapons, of their design, utilization, capabilities and capacities, and of security measures and other devices associated with the storage and use of such weapons, and would therefore conflict with the security data provisions of the Atomic Energy Act and with various federal regulations governing the disclosure of restricted and confidential information. Concluding that the Navy already had complied with NEPA "to the fullest extent possible," the district court entered judgment against the plaintiffs (App. E, *infra*, 16a).

The court of appeals reversed (App. A, *infra*, 1a-7a), and directed the Navy to prepare a "hypothetical" environmental impact statement assessing the "potential consequences of the storage of nuclear weapons at this particular site[,] [taking into] [c]onsideration * * * four environmental factors specified by [the plaintiffs] as being critically important * * *" (*id.* at 5a).[3] The court of appeals also directed the district court to reconsider, in light of the information contained in any such hypothetical environmental impact statement, whether the proposed expansion of the facility at West Loch implicated the National Historic Preservation Act or the Endangered Species Act. Finally, the court of ap-

[3] The four factors are: the risk of nuclear accidents; the enhancement of that risk by the proximity of West Loch to three airports; the likely effects of a nuclear accident on the population and environment surrounding West Loch; and the effects of continued low-level radiation seepage from nuclear warheads stored near populated areas. See App. A, *infra*, 3a.

peals "le[ft] to the district court the question whether injunctive relief is proper at this time." (*id.* at 7a).[4]

REASONS FOR GRANTING THE WRIT

The Department of Defense assumes that the National Environmental Policy Act of 1969 applies to all of its activities, classified and unclassified. Indeed, the Department's regulations on that score are unequivocal (32 C.F.R. 214.8(i)): "[t]he fact that a proposed action is of a classified nature does not relieve the proponent of the action from complying with the requirements of [NEPA as set forth in the Department's implementing regulations]." This regulation applies even to highly classified actions such as the maintenance and storage of nuclear warheads. Therefore, without confirming or denying that such weapons might in the future be stored there, the Navy consistently has acted on the premise that NEPA applies to its expansion and operation of the ordnance storage facility at West Loch.

The same regulation goes on to provide, however, that in such circumstances "[e]nvironmental statements, both draft and final, shall be prepared, safeguard and disseminated in accordance with the requirements applicable to classified information * * *. When feasible, these statements shall be organized in such a manner that classified portions can be

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[4] On remand, the respondents have moved to enjoin, pending the filing of a hypothetical environmental impact statement, the movement of nuclear weapons into the West Loch storage facility, and to require the Navy to remove from West Loch any nuclear weapons already stored there. No action has yet been taken on this motion.

made available to the public."[5] 32 C.F.R. 214.8(i). Thus, the crucial question is not whether the Navy must or will comply with NEPA insofar as that statute compels decisionmakers to take specified steps to inform themselves of, and take into account, the environmental consequences of the actions they propose. Rather, at issue is whether the provisions of NEPA relating to the *public development, disclosure and dissemination* of environmental impact statements invariably must be complied with, even where such compliance is likely to reveal military secrets.

The court of appeals attempted to steer a middle course between NEPA's disclosure requirements and

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[5] This regulation corresponds to a regulation promulgated by the Council on Environmental Quality ("CEQ"), the executive agency created by NEPA to, *inter alia*, "review and appraise the various programs and activities of the Federal Government * * * for the purpose of determining the extent to which such programs and activities are contributing to the achievement of [the policy underlying NEPA]" (42 U.S.C. 4344(3)) and the agency whose "interpretation of NEPA is entitled to substantial deference" (*Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979)). The CEQ regulation provides (40 C.F.R. 1507.3(c)):

> Agency procedures may include specific criteria for providing limited exceptions to the provisions of these regulations for classified proposals. They are proposed actions which are specifically authorized under criteria established by an Executive Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order or statute. Environmental assessments and environmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.

the secrecy that, by statute, must attend nuclear installations. As we shall presently demonstrate, the resultant compromise—a publicly available "hypothetical" environmental impact statement—although perhaps reasonable in concept, is quite unworkable in practice. Any EIS, including one based on a series of hypotheses, that is responsive to the environmental concerns articulated by the court of appeals, would necessarily reveal classified information about the types of weapons in our nuclear arsenal, their design and capabilities, and the safety and security measures employed in connection with them. The only way to avoid such a consequence would be to draft an EIS that in its unclassified form is so abstract, general and incomplete as to be, if not incomprehensible, of no appreciable benefit to anyone not privy to the classified annexes. And neither of these unsatisfactory alternatives would provide the decisionmaker—the Navy—with as much usable information about the actual environmental impact of its true plans as would a "real," albeit wholly classified, EIS. Moreover, the requirement that the Navy file a hypothetical EIS in connection with the West Loch storage facility would necessitate the preparation of similar EIS's for every other facility capable of storing nuclear weapons, without regard for whether such storage is actually contemplated, lest filing or the failure to file be taken as a key to where weapons are to be stored. The consequent administrative burdens far outstrip any the court of appeals reasonably could have anticipated or intended.

1. The Atomic Energy Act prohibits the public disclosure of information respecting the location, design, capabilities, capacities and security measures surrounding nuclear weapons.

The Atomic Energy Act of 1946, as amended, 42 U.S.C. 2011 *et seq.*, declares that all data concerning the design, manufacture or utilization of atomic weapons is "Restricted Data" (42 U.S.C. 2014(y)), and requires the Atomic Energy Commission [6] to control the dissemination and declassification of such data "in such a manner as to assure the common defense and security" (42 U.S.C. 2161). The Atomic Energy Commission can, and indeed must, from time to time determine whether Restricted Data may, "without undue risk to the common defense and security," be declassified and published. 42 U.S.C. 2162 (a). Where Restricted Data relates primarily to the military utilization of atomic weapons, the determination must be made jointly by the Commission and the Department of Defense. 42 U.S.C. 2162(c). Whenever the Commission and the Department conclude that information relating to the military utilization of atomic weapons should be neither restricted nor declassified and that it can be "adequately safeguarded as defense information" (42 U.S.C. 2162 (d)), they may lift its Restricted Data designation

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[6] The Atomic Energy Commission was abolished and its functions under 42 U.S.C. 2162 transferred to the Energy Research and Development Administration on October 11, 1974. Pub. L. No. 93-438, 88 Stat. 1233. The Energy Research and Development Administration, in turn, was terminated and its functions under 42 U.S.C. 2162 transferred to the Department of Energy on August 4, 1977. Pub. L. No. 95-91, Title III, Section 301, 91 Stat. 577. Except where the context dictates otherwise, our references to the Atomic Energy Commission apply to its successor agencies as well.

and thereafter apply to it the safeguards used to protect other classified military information.[7]

To implement these provisions governing the classification of information relating to the military use of nuclear weapons, the Energy Research and Development Administration[8] and the Department of Defense have prepared a Nuclear Weapons Classification Guide, CG-W-4 (App. H, *infra*, 36a-45a). That guide indicates generally what classification, if any, is to be given to various types of information. "U" means Unclassified, "C" means Confidential, "S" means Secret, and "TS" means Top Secret. "FRD" means Formerly Restricted Data. The following types of information, most of which formerly were Restricted Data, merit classifications ranging, depending upon the circumstances, from Confidential to Top Secret:

Item 1711: Planning or construction information revealing that installation is a nuclear weapons storage site (C-TS; FRD);

Item 1721: Information revealing installation is a storage site for nuclear weapons, whether or not presence of weapons can be determined (C-TS; FRD);

Item 1732: Quantity of nuclear weapons actually at a site (C; FRD);

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[7] There is a further proviso to the effect that no Formerly Restricted Data may be "transmitted or otherwise made available to any nation or regional defense organization, while such data remains defense information, except pursuant to an agreement for co-operation" entered into as elsewhere provided for in the Atomic Energy Act (42 U.S.C. 2162(d)).

[8] See note 6, *supra*.

Item 1742: Overall security measures for a site (S-TS);

Item 1743: Defensive plans for a storage site (S-TS);

Item 1744: Storage site vulnerability studies (S-TS);

Item 1752: That a particular Nuclear-Capable Unit actually has nuclear weapons (C-TS; FRD);

Item 1755: Number of nuclear weapons in storage or with a Nuclear or Nuclear-Capable Unit (C-TS; FRD).

The Department of the Navy has issued a manual entitled Navy Security Classification Guide for Nuclear Weapons, Navy SWOP 55-1 (App. I, *infra*, 46a-56a) that follows the same classification scheme. The first seven items listed in the paragraph above appear in the Navy Manual as items 2-11.1, 2-11.2, 2-11.6.2, 2-11.7.2, 2-11.7.3, 2-11.7.4, and 2.11.8.2, respectively.[9] The Navy also has issued a regulation, designated OPNAV INSTRUCTION 5721.1C (App. J, *infra*, 57a-59a), which forbids its members from revealing any information with respect to the presence or absence of nuclear weapons or components on board any ship, station or aircraft. The only response naval personnel may give to requests for such information is that "it is the policy of the United States Government neither to confirm nor deny the presence or absence of nuclear weapons or components

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[9]The eighth item undoubtedly also is listed in the Navy Manual, but not in the portion that has been declassified and made a part of the record in this case.

on board any ship, station, or aircraft" (App. J, *infra*, 58a).[10]

From even this brief examination it is apparent that virtually every aspect of the activity plaintiffs allege will take place at West Loch—the storage of nuclear weapons—involves restricted or classified military secrets, the disclosure of which is forbidden by the Atomic Energy Act, its implementing regulations and 18 U.S.C. 798.

2. NEPA does not require the public disclosure of information the secrecy of which is mandated by the Atomic Energy Act.

By its own terms, NEPA requires no more than that agencies comply with its policies "to the fullest extent possible." 42 U.S.C. 4332. To be sure, as this Court cautioned in *Flint Ridge Dev. Co.* v. *Scenic Rivers Ass'n*, 426 U.S. 776 (1976), that phrase "is neither accidental nor hyperbolic" and "is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle." *Id.* at 787. Nevertheless the phrase is also a limitation that "recognizes * * * that where a clear and unavoidable conflict in statutory authority exists, NEPA must give way. As we noted in *United States* v. *SCRAP*, 412 U.S. 669, 694 (1973), 'NEPA was not intended to repeal by implication any other statute.' "

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[10] The communication of Restricted Data to anyone not authorized by the Atomic Energy Act to receive it is a criminal offense, punishable by a fine of not more than $2,500. 42 U.S.C. 2277. The furnishing of classified information to an unauthorized person is a criminal offense, punishable by a fine of not more than $10,000 or imprisonment for not more than 10 years, or both. 18 U.S.C. 798.

426 U.S. at 788. It therefore follows that to the extent the public disclosure provisions of NEPA cannot be reconciled with the nondisclosure provisions of the Atomic Energy Act, the latter must prevail. The same conclusion is dictated by the Atomic Energy Act which specifically directs, at 42 U.S.C. 2166(a), that "no Government agency shall take any action under * * * other laws inconsistent with the [Atomic Energy Act's] provisions" governing restricted and classified information.

3. The hypothetical environmental impact statement envisioned by the court of appeals would, of necessity, disclose classified information regarding the types of nuclear weapons the United States has developed, the design of such weapons, their capacities and capabilities, their vulnerabilities, and the steps taken to safeguard them.

The court of appeals apparently recognized that a standard environmental impact statement, if publicly disclosed, would reveal military secrets including whether nuclear warheads are to be stored at a particular site, and if so, in what numbers. In order to avoid that consequence while at the same time honoring NEPA, the court suggested at oral argument and developed in its opinion the concept of an EIS that would "hypothesiz[e], without conceding, that the [West Loch] facility will be put to the use for which it has been made capable," and would draw conclusions "based on a series of hypotheses covering the range of options which the facility has openly presented to the Secretary [of the Navy]" (App. A, *infra*, 6a; footnote omitted).[11] The resultant hy-

[11] The Navy stipulated, for purposes of this case, that the West Loch facility is "capable" of storing nuclear weapons. Based on that stipulation, the court of appeals opined:

pothetical EIS concededly would have the virtue of neither confirming nor denying that nuclear weapons are being stored at a particular site,[12] and would keep secret the actual nuclear firepower at the Navy's disposal. However, even a hypothetical EIS would perforce disclose other information that is equally (or, in some cases, more highly) classified.

For example, were an EIS to hypothesize that a particular facility might store nuclear warheads of type A, that hypothesis would reveal that somewhere in our nuclear arsenal there exist weapons of type A. Similarly, an EIS that addressed, even as a hypothetical matter, the risk that a type A warhead might inadvertently be detonated, and the destructive forces, if any, that such a detonation would unleash, would of necessity touch upon the design of the weapon, its payload, and its destructive capability. Also pertinent would be the design and vulnerability, *vel non*, of the storage site, and the safety and security devices and measures surrounding it.

In theory, the disclosure of secret information could be avoided through the use of classified annexes. See pages 9-10, *supra*. However, since that which can be revealed is in many respects inextricably intertwined with that which must be kept secret, and in view of the inescapable imperative that the Navy

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"[t]he public therefore must assume that at least the possibility exists that nuclear weapons, to the extent of the apparent capacity of the facility (assuming that capacity would be apparent to a knowledgeable observer), will be stored at West Loch" (App. A, *infra*, 5a).

[12] However, the fact of its preparation and dissemination would signal the storage of nuclear weapons unless "cover" hypothetical EIS's were filed in connection with other facilities. See pages 18-19, *infra*.

must err, if at all, on the side of nondisclosure, the publicly-available portion of a partially-classified hypothetical EIS would, in most instances and respects be incomprehensible, or would be so abstract, general and incomplete as to be of no appreciable benefit to Congress, sister agencies, or the general public. Nor would the Navy benefit from such an exercise. NEPA's overriding mandate that decisionmakers inform themselves of the environmental consequences of their proposed actions and take those considerations into account can best be served by the filing, where appropriate, of a "real" EIS directed to the Navy's true plans, even if much, or all of the statement, is withheld from the public.[13]

Finally, the court of appeals' attempt to reconcile the irreconcilable would impose inordinate, and presumably unintended, administrative burdens on the Navy. Once the Navy prepares and disseminates an EIS hypothesizing the storage of nuclear weapons at one facility, it logically must do the same for every other facility capable of storing such weapons,[14] for

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[13] In some circumstances, the result may be that no meaningful adversary proceeding can be pursued. But sometimes "some of the interests of the adversary process are outweighed by the nation's legitimate interests in secrecy and orderly process for disclosure." *Hayden* v. *Nat'l Security Agency/Central Security Service*, 608 F.2d 1381, 1385 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980). See also *Farnsworth Cannon, Inc.* v. *Alton B. Grimes*, No. 79-1260 (4th Cir. Dec. 15, 1980) (en banc).

[14] Indeed, hypothetical EIS's would have to be prepared not only for facilities actually capable of storing nuclear weapons, but for facilities perceived to have that capability as well, lest those who have guessed wrong be given a more accurate picture of our nuclear strength and flexibility.

if hypothetical EIS's were prepared and disseminated only for those facilities where nuclear weapons in fact are stored, the EIS would serve as a kind of paper signpost advertising the site's existence and purpose. The preparation of hypothetical EIS's for facilities where nuclear warhead storage is in fact contemplated conceivably would not place a significantly greater burden on the Navy than would the preparation of standard EIS's. But the preparation of hypothetical EIS's for facilities where such weapons are *not* likely to be stored would be expensive, unsettling, controversial, time-consuming and valueless.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1981

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

D.C. No. 78-0085 HBT Hawaii

C.A. No. 79-4330

[Filed Jul. 17, 1980]

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, ET AL., PLAINTIFFS-APPELLANTS

vs.

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL., DEFENDANTS-APPELLEES

On Appeal from the United States District Court for the District of Hawaii

Before: MERRILL, SCHROEDER and FLETCHER, Circuit Judges

OPINION

MERRILL, Circuit Judge:

This action was brought by appellants, several Hawaii based environmental groups and individuals concerned with the protection of the environment. They seek to require the United States Navy to file an environmental impact statement (EIS), pursuant to the National Environmental Policy Act (NEPA), and to comply with other federal statutes protecting endangered species and historic sites in connection

with alleged plans to store nuclear weapons at the West Loch branch of the Lualualei naval magazine on the island of Oahu, Hawaii.

The West Loch facility has, since 1959, been used for handling and storage of ammunition. It is located one mile from the final approach to a major runway at the Honolulu International Airport and in close proximity to airports at Hickman Airforce Base and Barber's Point Naval Air Station.

In 1975, the Navy prepared an environmental impact assessment (EIA) of the environmental consequences which might result from the planned transfer to West Loch of weapons being stored at Waikele branch of the Laulualei magazine. The assessment concluded that the construction of the magazines and buildings to accommodate the relocation of weapons would have no significant impact on the environment beyond that of the weapons previously stored there. Consequently, it concluded that no EIS was necessary, and none was prepared. However, the EIA did not take into consideration the possibility that nuclear weapons might be stored at the new facility; only conventional weapons had previously been stored at West Loch.

In March, 1977, a contract was let for a portion of the construction dealt with in the EIA. In April, 1978, a contract was let for the balance.

In 1978, the Navy prepared a candidate environmental impact statement (CEIS) entitled "Nuclear Aspects of Naval Weapons Systems Storage." It dealt generally, without reference to any specific site, with the hazards connected with storage of nuclear warheads and concluded that "The handling, storage and transportation of nuclear weapons present no hazards to the environment." It did not discuss the likelihood or potential effects of nuclear explosion or

detonation resulting from sabotage or an accident caused by crash of an airplane into a storage facility.

In March, 1978, this action was brought seeking an injunction against the building of the new facilities until an EIS had been filed. A preliminary injunction was sought and denied. The new facilities have now been completed. It is stipulated that the new construction is capable of maintaining and storing nuclear weapons. Navy regulations, in the interest of national security, will permit it neither to admit nor deny that plans exist to store nuclear weapons there.

The Okiokiolepe Fishpond, listed on the National Register of Historic Places, is located 750 feet from the new storage site. It is virtually the only fishpond left of many that once were located in the Pearl Harbor area. The Hawaiian stilt is a rare waterbird whose habitat is in the West Loch area.

It is the contention of appellants that the EIA does not satisfy the requirements of NEPA, in that it has ignored four critically important environmental factors: (1) The risk of nuclear accidents; (2) The enhancement of that risk by the physical proximity of the airports; (3) The effects of any nuclear accident upon the surrounding population and environment of Hawaii; and (4) The effects of continual low-level radiation from the storage of the weapons near populated areas. It is contended that the CEIS, not being site specific, can supply none of these factors.

The district court concluded that the West Loch project was major federal action significantly affecting the environment, and that the defendants were required to comply with NEPA "to the fullest extent possible." It concluded, however, that the Navy had complied so far as was possible, given certain na-

tional security provisions of the Atomic Energy Act and certain Navy regulations relative to the classification of nuclear weapons. Appellants' case was dismissed, and this appeal followed.

The Navy contends in its brief on appeal:

> "* * * the Atomic Energy Act, and the various Department of Defense and Navy directives which implement that Act, forbid the disclosure of information relating to the presence of nuclear weapons at military bases. There is simply no way that the Department of the Navy can on the one hand preserve the secrecy required by the Atomic Energy Act with respect to the presence or absence at West Loch of nuclear weapons, and on the other hand prepare and make available to the public a statement with respect to the impact upon the environment of the storage of nuclear weapons at West Loch. Compliance with one statute precludes compliance with the other."

Accepting *arguendo* that the Atomic Energy Act and the directives which implement it forbid any disclosure of information regarding the presence of nuclear weapons at a military base, we cannot agree that this precludes preparation of an EIS with respect to the storage of nuclear weapons at West Loch.

An EIS, to be sufficient, must deal not only with the environmental consequences of the original construction involved in the project, but with the environmental consequences of the operation of the facility. *Concerned About Trident* v. *Rumsfeld*, 555 F.2d 817 (D.C. Cir. 1977). If operation involves a choice between alternatives, the decision maker must be so informed as to the consequences of each alter-

native that a knowledgeable choice can be made. Here, the Secretary must be informed as to the consequences of his choice of weapons to be stored. If nuclear storage is a potential choice, he must be adequately prepared to make such choice when the time for decision arrives.

In the present case it is stipulated that the West Loch facilities are capable of storing nuclear weapons. The public therefore must assume that at least the possibility exists that nuclear weapons, to the extent of the apparent capacity of the facility (assuming that capacity would be apparent to a knowledgeable observer), will be stored at West Loch. Thus, an EIS dealing with the consequences of such possibility would reveal nothing with respect to the likelihood of storage of which the public is not already aware. Such a process of informing the decision maker need not imply that the decision has already been made or what the decision is; the Secretary need never reveal the fact that a decision has been made or what it is. However, the public must receive some assurance, particularly in a situation as potentially catastrophic as this one, that when the decision is made the decision maker will have been adequately informed as to the environmental consequences of each alternative, here including the potential consequences of the storage of nuclear weapons at this particular site. Consideration of the four environmental factors specified by appellants as being critically important is essential if the decision maker is to be adequately prepared when the time for decision respecting nuclear storage arrives.

While we recognize that specific information regarding the number and type of nuclear weapons to be stored at West Loch cannot be revealed to the public, this should not preclude preparation of an

EIS, available to the public, generally assessing the impact of such storage. Further, since the EIS in important respects will be hypothetical (hypothesizing, without conceding, that the facility will be put to the use for which it has been made capable), factual information as to the consequences of storage to any specific extent can be based on a series of hypotheses covering the range of options which the facility has openly presented to the Secretary.[1]

We note further that the informing of the decision maker is not the only result flowing from the filing of an EIS pursuant to NEPA. The public also is informed as to the consequences of action being sought by governmental agencies. While courts are reluctant to second-guess an informed decision maker as to what is or is not in the public interest, an in-

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[1] In addition to public disclosure through a hypothetical EIS, the Navy's own regulations recognize the fact that the classified nature of certain essential information—here, the specific number and type of weapons to be stored at West Loch—does not excuse the private disclosure of such information to the Secretary by way of an EIS.

> "The fact that a proposed action is of a classified nature does not relieve the proponent of the action from complying with the requirements of this Part. Environmental statements, both draft and final, shall be prepared, safeguarded and disseminated in accord with the requirements applicable to classified information * * *. When feasible, these statements shall be organized in such a manner that classified portions can be included as annexes, so that the unclassified portions can be made available to the public."

32 C.F.R. § 214.8(i). While such classified matter need not be publicly disclosed, the public at least is entitled to the assurance that the Secretary has been privately informed in that area and that such matters will be taken into consideration by him in reaching any decision.

formed electorate need not be reluctant. For this reason, it seems to us to be important that the public be informed where, as here, disclosure can be so conditioned as not to impinge upon national security. Otherwise, agencies would be able to escape the consequences of the political process as it may operate on an unpopular decision by concealing from the public the fact that such a decision has been or may be made.

With respect to the Okiokiolepe Fishpond the court below concluded that the construction and use of the new West Loch storage facility would have no impact on the fishpond or on the rare Hawaiian stilt, whose habitat it is. The court so concluded because it accepted the Navy's contention that only the impact of storing additional conventional weapons at West Loch could be considered. We leave it for the district court to determine the effect of § 470(f) of the Historic Preservation Act and of § 1536 of the Endangered Species Act in light of the information contained in the EIS which is prepared by the Navy.

Finally, appellants contend that they should be permitted to amend their complaint on appeal to allege a denial of Fifth Amendment due process. Appellants may advance this contention to the district court on remand.

We conclude that while the district court correctly held that the West Loch project was major federal action, it erred in holding that the Navy has complied with NEPA to the fullest extent possible. We conclude that the EIA and the CEIS provided by the Navy are inadequate and that an EIS is required under the provisions of NEPA.

Reversed and remanded for further proceedings. We leave to the district court the question whether injunctive relief is proper at this time.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-4330
DC CV 78-0085-HBT

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, ET AL., PLAINTIFFS-APPELLANTS

v.

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court for the District of HAWAII (Honolulu)

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of HAWAII (Honolulu) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

Filed and entered July 17, 1980.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.A. No. 79-4330

D.C. No. 78-0085 HBT Hawaii

[Filed Oct. 10, 1980]

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, ET AL., PLAINTIFFS-APPELLANTS

vs.

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL., DEFENDANTS-APPELLEES

Before: MERRILL, SCHROEDER and FLETCHER, Circuit Judges

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Schroeder and Fletcher have voted to reject the suggestion for a rehearing in banc and Judge Merrill has recommended such rejection.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 78-0085

[Filed Mar. 13, 1979]

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, ET AL., PLAINTIFFS-APPELLANTS

v.

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL., DEFENDANTS-APPELLEES

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This is a suit to enjoin the Navy from using certain newly constructed facilities at the West Loch Branch of its Pearl Harbor Naval Base in Honolulu, Hawaii. The matter came on for hearing on the issuance of a permanent injunction on March 5 and 6, 1979, before the Honorable Howard B. Turrentine. Walter Zulkoski appeared on behalf of plaintiffs, and Elliot Enoki, Assistant United States Attorney, assisted by Samuel Pinn and Jeffrey Wayne, appeared for the defendants.

Plaintiffs seek injunctive relief on the grounds that defendants have violated the National Environmental Policy Act, 42 U.S.C. §§ 4331 et. seq., by failing to prepare an Environmental Impact Statement, and further, that defendants have violated the Endan-

gered Species Act, 16 U.S.C. § 1536 and the National Historic Preservation Act, 16 U.S.C. § 470.

Defendants contend that they are excused from preparing an Environmental Impact Statement due to conflict between National Environmental Policy Act and the Atomic Energy Act, 42 U.S.C. §§ 2011, et. seq., and that they have complied with the requirement of both the Endangered Species Act and the National Historic Preservation Act.

Jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331, 1361; 16 U.S.C. § 1540 and 28 U.S.C. § 2201, 2202. Upon consideration of all the evidence presented, the pleadings on file and the argument of counsel, the court now makes the following findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure:

FINDINGS OF FACT

Parties

1. The plaintiffs are residents of Honolulu, Hawaii, and use the areas adjacent to the proposed new facilities for recreation and/or residential purposes.

2. The defendants are United States Department of Defense and United States Navy officials sued in their official capacities. Defendants are constructing munitions storage facilities capable of storing and maintaining nuclear weapons on the West Loch Branch of Laulualei Magazine.

3. The United States Navy maintains various munitions storage facilities on the Island of Oahu, State of Hawaii, designated Naval Magazine, Laulualei. One branch of this magazine is located at Waikele.

4. Commencing in 1973, a study was conducted by the United States Navy to determine the feasibility of relocating the Waikele function due to in-

creased residential development in the area and in order to minimize any dangers attendant to movement of ordnance.

5. The study concluded that the West Loch Branch was the preferred relocation site because transportation of ordnance to and from the wharves would be held to a minimum. The study was reviewed by the Explosive Safety Board of the Department of Defense and approved in 1975. The West Loch Branch has been used for ordnance storage and maintenance since 1942.

6. In order to execute the desired relocation, the existing facilities at West Loch had to be expanded, which required programming through the congressionally authorized military construction program. The project was properly submitted to Congress in compliance with all applicable regulations. Congress approved the appropriation and authorized funds for the project based upon the project supporting documentation which included a specific description of the facilities to be constructed and the operations to be conducted within the facilities. The project documentation specifically stated that the facilities were to be built to accommodate ordnance items to be relocated from Waikele.

7. The cost of the facility is over eight million dollars.

8. The Explosive Safety Quantity Distance (ESQD) associated with the relocated functions would fall totally within Navy controlled property and within areas already encumbered by the ESQD arcs from the ammunition handling wharves and existing ammunition storage facilities and would not encumber any inhabited structure publicly or privately owned. The additional facilities would also be pro-

tected from encroachment by residential development due to ESQD safety buffer areas of Navy-owned property.

9. The West Loch storage facility is within the traffic area of Honolulu International Airport and approximately one mile from the landing flight path for flights from the mainland and elsewhere. The Federal Aviation Administration has not established a prohibited flight zone over this area.

10. The Navy prepared a classified Environmental Impact Assessment (EIA) which concluded that the project would have "no significant impact on the environment" and would not be environmentally controversial. In preparing the EIA, the Navy considered Hawaiian Stilt and its habitat, utilizing the services of of a wildlife biologist. There are no other endangered species in the area. The Navy further considered the existence of the Okiokiolepe Fishpond, a site listed on the National Register of Historic Places, and concluded that the fishpond would not be affected by the project.

11. The Navy did not submit an Environmental Impact Statement (EIS) on the project because such a statement would involve discussion of the presence, number, and locations of atomic weapons; the design, utilization, capabilities and capacities of such weapons; and security measures and devices incident to the weapons.

CONCLUSIONS OF LAW

1. Plaintiffs did not wait an unreasonable length of time before commencing this action, and thus are not barred by laches.

2. Defendants have determined that the West Loch project does not jeopardize the Hawaiian Stilt or affect its habitat; therefore, they are not in violation

of the Endangered Species Act, 16 U.S.C. § 1536.

3. As a result of the conclusion reached in the Environmental Impact Assessment regarding the Okiokiolepe Fishpond, defendants are not in violation of the National Historic Preservation Act, 16 U.S.C. § 470.

4. The construction and use of the storage facilities at West Loch is a major Federal action within the meaning of the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C).

5. A controversy exists regarding the environmental consequences of the West Loch project, 40 C.F.R. 1500.6(a).

6. The National Environmental Policy Act requires all Federal agencies to comply therewith to the fullest extent possible, 42 U.S.C. § 4331, unless existing law applicable to the agency's operation prohibits or makes compliance impossible, 40 C.F.R. 1500.4(a)(1).

7. Submission of an Environmental Impact Statement would conflict with the security data provisions of the Atomic Energy Act, 42 U.S.C. 2014(y); with security classification guides prepared jointly by the Department of Defense and the Department of Energy, CG-W-4, JOINT ERDA/DOD NUCLEAR WEAPONS CLASSIFICATION GUIDE; and with United States Navy implementation of the joint guide, SWOP 55-1, NAVY SECURITY CLASSIFICATION GUIDE FOR NUCLEAR WEAPONS.

8. Defendants have complied with the National Environmental Policy Act to the fullest extent possible within the restrictions of the security classification guides and the Atomic Energy Act. See, *e.g. Flint Ridge Dev. Co.* v. *Scenic Rivers Ass'n.*, 426 U.S. 776 (1976).

9. Defendants' decision that an Environmental Impact Statement could not be submitted consistent with the Atomic Energy Act was reasonable and not arbitrary or capricious, and thus did not violate the Administrative Procedures Act, 5 U.S.C. § 706(2)(A).

Plaintiffs' motion for permanent injunction is hereby denied.

Let judgment be entered accordingly.

Dated: March 13, 1979, Honolulu, Hawaii.

/s/ Howard B. Turrentine
HOWARD B. TURRENTINE
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil Action File No. 78-0085

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, ET AL., PLAINTIFF

vs.

HAROLD BROWN, SECRETARY OF DEFENSE, ET AL., DEFENDANTS

[Filed Mar. 13, 1979]

JUDGMENT

This action came on for (hearing) before the Court, Honorable HOWARD B. TURRENTINE, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that Plaintiffs' motion for permanent injunction is hereby denied.

Dated at Honolulu, Hawaii, this 13th day of March 1979.

/s/ Walter A. Y. H. Chinn
Clerk of Court

cc: Mr. Walter P. Zulkoski
Mr. Walter M. Heen

APPENDIX F

UNCLASSIFIED
FOR OFFICIAL USE ONLY

ENVIRONMENTAL IMPACT ASSESSMENT

Submitting DOD Component: Department of the Navy

Installation: Naval Magazine, Lualualei, Oahu (West Loch Branch)

Project Title: MILCON Project P-088 and P-093, "Relocation of Waikele Functions"

Date of Submission: 11 March 1975

(Updated 31 May 1977, Revised 8 June 1977)

Prepared by the Pacific Division, Naval Facilities Engineering Command for the Commanding Officer, Naval Magazine, Lualualei for CINCPACFLT, in accordance with OPNAVINST 6240.3D of 24 April 1975, in compliance with Section 102(2)(c) of the National Environmental Policy Act of 1969.

A. *Introduction*

1. *Project Description*:

This project is for the construction of facilities at West Loch Branch necessary to accommodate partial relocation to West Loch Branch of functions that are now housed at the Waikele Branch. This action will effect better consolidation and control of current ordnance activities. This action will reduce the danger to areas surrounding Waikele and utilize the existing explosive safety zones at West Loch (See Attachments A through D).

The project includes the construction of: 48 earth covered magazines, maintenance/inspection shop, addition to an existing shop, security force building, helicopter pad, perimeter barrier/fence, security system, roads/parking, and electrical, water and sewer utility services. These new faciilties will occupy approximately 40 acres located within the existing explosive safety zones from the ammunition wharves (See Attachment D).

2. *Existing Site Characteristics*:

West Loch Branch is a branch of Naval Magazine, Lualualei and is located to the West of Pearl Harbor (see Attachments A through C). West Loch Branch encompasses approximately 1,800 acres and is enclosed to the North and East by Pearl Harbor (West Loch); to the West by private agricultural land and to the South by Navy housing and the Federal Aviation Agency reservation. The proposed site is located between Eleventh and Fifteenth Streets and "G" Avenue near the West Loch shoreline. A second increment is bounded by Eleventh and Twelfth Streets and Bravo Street, where existing pavement is to be strengthened.

The land [on] this site is flat and open, having been used during World War II as a supply area. Earlier structures have now been removed. The soil is basically of coral origin, covered 99% by grass, without other vegetation. The site is near Hale Koa trees along G Avenue, and near an old borrow pit covered with Keawe trees, local shrubs, and grass, containing various birds, insects, and possibly frogs, utilizing moist areas. The site in question is without vegetation conducive to food source and nesting potential.

West Loch Branch is used to off/on load explosive cargo ships and to process and store ammunition and

other ordnance items (See Attachment C). Since the proposed new site is within the existing explosive safety zone from ammunition wharves W-4 and W-5, this relocation of functions represents efficient and economical use of existing land not now fully developed, but which is limited in use for other purposes because of the encumbering explosive safety zone (i.e., cattle grazing, sugar-cane growing, and bee-keeping). Efficient utilization of existing lands is an on-going concern of the U.S. Navy.

B. *Relationship of Proposed Action to Land Use Plans, Policies and Controls for the Affected Area*

The proposed project site to which the functions will be relocated does not conflict with existing or proposed facilities. The West Loch Branch of Naval Magazine, Lualualei, has the capacity to accommodate such functions.

The existing facilities at West Loch Branch will be modified/enlarged to accommodate the new functions without difficulty. The addition of any new facilities adjacent to similar ones conforms to the policy of keeping functions centered in one area.

The relocation of the proposed shops and magazines within West Loch Branch should have negligible effect on the environment on or off base.

The proposed facilities at West Loch Branch will be approximately three miles from the new civilian community developments near Honouliuli and Ewa communities now being planned by the Campbell Estate outside safety zones noted above.

The urban growth of the City and County of Honolulu in this direction is assured in future years, but it is anticipated that the industrial areas presently held by the U.S. Navy plus those approved by public

law for acquisition by land exchange will neither increase nor decrease as the land is efficiently utilized for their continuing functions.

C. *The Probable Impact of the Proposed Action on the Environment*

1. *Assessment of Position and Negative Effects*:

The project will have minimal effects on the environment. The following is stated for the record:

a. *Plant and Animal life*

The limited removal of trees, shrubs and grass at the construction site will not cause detrimental ecological change to the area. There are no known significant species on the site. The normal "Special Considerations" in construction practices would apply.

b. *Historic Sites*

There is a significant fish pond on the National Register of Historic Places that is within the present Naval Reservation near the entrance to West Loch from the Pearl Harbor entrance channel, but this will not be affected. The Okiokiolepe Fish Pond is 0.3 miles NW of Iroquois Point. Its significance is that it is virtually the only fish pond left of the many once located in the Pearl Harbor area (see Attachment B).

c. *Air and Noise Pollution*

Except for some dust and noise during construction, there will be no air/noise pollution. Normal construction practices for keeping dust pollution to a minimum will be observed.

d. *Erosion*

The proposed site area is flat. Erosion will be limited to the earth covering the magazines. This erosion will be controlled by planting grass or by utilizing coral/basalt aggregates cover and, therefore, should not be a pollution problem. The soil and aggregate cover will be obtained from commercial sources on Oahu and the total requirement is estimated at 55,000 cubic yards.

Monitoring of grading practices is being exercised by Commandant, Fourteenth Naval District, to insure that erosion of lands, sedimentation of tributaries, and siltation of Pearl Harbor is kept to a minimum.

e. *Access Roads*

Construction of roads to the facilities involves minimum cut and fill but should not alter the environment. These new roads will be built within the existing compound to serve the new facilities and will be approximately 10% of site area. There are no interior roads on the existing site.

f. *Sanitary Sewage*

Sewage disposal will be accomplished by connection to the existing activated sludge sewage treatment plant, which has the capacity to handle the additional load. Upon completion of the City and County-administered Honoluliuli Sewage Treatment Plant, a sewage connection will be made to this new facility, some time in the future.

g. *Storm Run-Off*

The project is not expected to alter the existing surface drainage on this World War II supply site.

The new buildings and proopsed road and handling pavements will decrease the area of percolation. The porous coral subsurface should accommodate the rainfall expected in this area to prevent flooding.

h. *Toxic Material*

Toxic materials used in the maintenance operation consist of cleaning solvents. These solvents will be collected and disposed of by contract to commercial firms.

i. *Reassignment of Facilities*

The partial relocation of functions from the Waikele Branch will allow redesignation of the present facilities. At the present time, there is no final decision to close out or excess any of the present Waikele Branch facilities which may remain vacant.

2. *Secondary or Indirect Consequences*

a. The relocation of the functions to West Loch Branch will reduce the need to transport ordnance to Waikele Branch. This will result in the conservation of fuel energy and in reducing security requirements for movement of ordnance off base. The consolidation of functions at West Loch Branch should result in a net decrease in funding, equipment and manpower requirements. The decrease in manpower requirements will include only military personnel who will be transferred to other duties at other locations.

b. The relation of the function/workforce to West Loch Branch will result in an increase of 77 military personnel at the West Loch Branch area. Since the relocation involves only a distance of six miles, the impact to the local community is expected to be

negligible. Additionally, there are only ten family quarters at Waikele Branch, negating any significant family relocation.

For the comparison, in 1976 the estimated armed forces strength was 59,700 in Hawaii and estimated City and County of Honolulu work force was 320,300 for a comparable period. The entire island of Oahu is one community area. On this basis a relocation of 77 workers a distance of six miles must be considered insignificant.

D. *Alternatives* (See Attachment A)

1. The alternative of taking no action or of postponing action pending further study will keep the present functions at Waikele Branch. Expansion of the civilian community will be a continuing problem at Waikele Branch, as urban Honolulu growth spreads towards Ewa and Mililani Town and as these communities expand in size. Security requirements will become more stringent as the population increases in the area. Transportation of ordnance between Waikele and West Loch Branch over public highways is becoming unacceptable from the standpoint of safety and security.

2. The proposed partial relocation of functions to West Loch Branch, as is recommended, will answer two problems at the present site. These are the increased safety problems as the surrounding area is urbanized in future years, and the possibility increasing traffic congestion on highways because of greater commuter traffic from outlying communities to urban Honolulu. It also will result in better ordnance control and more effective use of existing lands for the ordnance function.

3. Relocation of these functions to NAS Barbers Point or NAVMAG Lualualei has also been con-

sidered. Relocation to West Loch Branch is the most viable solution from the standpoint of operational, security and safety requirements. From an ecological standpoint, there are similarities in the sites considered.

4. A plan for the consolidation of ordnance originally involved the relocation of ordnance storage from Laulaulei Branch to West Loch Branch and Waikele Branch. Subsequently, the plan was revised to retain Lualualei Branch and relocate the functions at Waikele Branch to Laulaulei Branch. This revised plan was a recommendation of the DOD Project FRESH (Facilities Requirements Evaluation, State of Hawaii) Supplemental Study on ordinance storage on Oahu. The partial relocation of the ordnance storage at Waikele Branch is expected to have minimal adverse impact on the civilian community for the following reasons:

a. The distance between Waikele Branch and West Loch Branch is only six miles.

b. This functional relocation will offset the work location of 77 military personnel. However, movement of families is not required except for the families occupying the ten family quarters at Waikele Branch.

c. Bachelor personnel would either be berthed at West Loch Branch or Naval Air Station Barbers Point or would possibly remain at Waikele Branch until replacement quarters are constructed and all Waikele Branch functions are relocated.

E. *Any Probable Adverse Environmental Effects Which Cannot be Avoided Should the Proposal be Implemented*

There will be temporary dust and noise during construction but no permanent dust/noise problem.

Approximately 45 acres of land will be cleared of trees, shrubs and grass. Except for areas to be occupied by buildings or pavement, grass growth should be back soon after construction, as evident in adjacent open field areas.

F. *The Relationship Between Local Short-Term Use of Man's Environment and the Maintenance and Enhancement of Long-Term Productivity*

The project will be constructed within the existing explosive safety quantity-distance arc, from ammunition wharves W-4 and W-5. The present is compatible with current and planned uses of West Loch Branch.

The consolidation of functions will be beneficial to the military from the standpoint of combining operations at West Loch and eliminating the need to buy/lease additional land totaling 661 acres at Waikele Branch to preclude exposure of civilian personnel to explosive hazards. The land at Waikele can then be used for other purposes.

G. *Any Irreversible and Irretrievable Commitments of Resources that Would be Involved in the Proposed Action Should it be Implemented*

This project requires no major alterations to the site, and there will be no irreversible and irretrievable commitments of resources. However, there will be expenditure of fossil fuel in the moving operation.

The buildings, structures and pavements can be removed at the termination of the requirement. Vegetation will return shortly, as evidenced by growth in adjacent areas, which were previously cleared.

H. *Considerations that Offset the Adverse Environmental Effects*

West Loch Branch is a transit point for the shipment of ammunition by water as well as a storage site. Reducing the need to transport ordnance to Waikele Branch will reduce security force requirements and fuel consumption. If the presently proposed national program for energy conservation is implemented, the reduction of fuel consumption through excessive hauling may become a significant U.S. Navy concern.

Relocating functions out of Waikele Branch will solve the growing safety problem. Consolidation of handling in one location will result in a more efficient operation and will be a step towards reassignment of Waikele Branch facilities for a non-ordnance function.

This relocation of ordnance storage from Waikele Branch will reduce the problem generated by the adjacent residential development and the unsafe condition associated with inhabited buildings within the explosive safety zone. This project will negate the need to acquire 661 acres of private lands surrounding Waikele Branch in order to maintain control of all lands within the explosive safety zone.

This project can be accomplished without impact on the safety or functional uses of West Loch Branch.

I. *Summary*

It is concluded that the project will have no significant effect on the environment and will not be environmentally controversial. Preparation of a candidate Environmental Impact Statement is therefore not considered required.

APPENDIX G

CANDIDATE ENVIRONMENTAL IMPACT STATEMENT

NUCLEAR ASPECTS OF NAVAL WEAPONS SYSTEMS STORAGE

"Prepared in accordance with OPNAVINST 6240.3E in compliance with section 102(2)(c) of the National Environmental Policy Act of 1969."

ENCL (1) TO CNO SER 453/719097 of 28 Mar 1978

CANDIDATE ENVIRONMENTAL IMPACT STATEMENT
NUCLEAR ASPECTS OF NAVAL WEAPONS SYSTEMS STORAGE

SECTION I—INTRODUCTION

A. *PROJECT DESCRIPTION*

Within the role of the Department of Defense for national defense, the development and maintenance of military weaponry/ordnance is among the foremost responsibilities. To maintain an effective defensive posture, offensive capabilities are required to be developed and maintained. This capability is accomplished through establishment of current, effective weapons systems:

The fleet, to conduct its mission of patrolling international waters, must have effective methods of supply and resupply of necessary ordnance. Also the fleet must be configured to react to various tactical and strategic scenarios, including a nuclear attack. Storage sites ashore are a necessary, irreplaceable segment of the national defense capability.

The proposed "action" is to continue to store conventional and/or nuclear ordnance at selected sites and to specifically address the nuclear aspects of said storage with particular attention to any associated "environmental" impact.

B. *Existing Environment of Ordnance Storage Sites*

Ordnance storage facilities owned, and operated by or for, the Armed Services, are constructed in accordance with standards published by the Department of Defense. The governing publication is DoD

Publication 5154.4S, "DoD Ammunition and Explosives Safety Standards", of which the latest edition is dated March 1976. This publication may be purchased from the Superintendent of Documents, Washington, DC, 20402 (Stock No. 008-007-02730-1, price $1.65). Such facilities normally include storage magazines; rail and/or truck facilities to ship munitions in and out; various types of operating functions such as production, renovation, disposal; and, at waterfront activities, one or more piers or wharves to permit transfers of munitions to and from ships.

At ordnance storage facilities, layout of the many functional areas, and the elements thereof; and the permitted concentrations of explosives and explosive-loaded items, are specifically designed to minimize, within practical limits, the possibility of "chain" transmission of explosive effects in the event of an accident at any location on the installation. The DoD Standards mentioned above were developed by the DoD Explosives Safety Board, an organization originally created by the Congress to assure, inter alia, the availability of reasonable and safe standards for military installations involved with explosives.

Munitions storage and operating facilities and the distance requirements which govern their separation one from another and from installation boundaries, are keyed to the allowable quantities of explosive materials which may be concentrated, or grouped, at the individual facilities involved. Normally, this is a direct function of the explosive loading of the munitions which are stored, or processed, at these facilities. This situation is valid for the storage of nuclear munitions as well as for non-nuclear (conventional) munitions. The storage of nuclear weapons *considers*, in addition, the quantity of radioactive material which might be dispersed in event of an *ex-*

plosive accident. Both considerations are fully controlled, in military installations, by limiting the concentrations of weapons so as to minimize any of the possible risk situations. It should be noted that the design and structure of nuclear weapons will not permit an accidental nuclear explosion or a nuclear contribution to the explosion of conventional explosives. National policy therefore dictates storage of nuclear weapons on the basis of high explosive content and/or radioactive contamination potential. As pointed out above, all such storages are specially designed in accordance with DoD standards, and rigorously controlled to avoid the generation of unsafe conditions or concentrations.

SECTION II—*RELATIONSHIP OF PROPOSED ACTION TO LAND USE PLANS, POLICIES AND CONTROLS FOR THE AFFECTED AREA*

As it is expected that storage sites noted will remain essentially as presently configured, there are no proposed "actions" that affect either the objectives of specific terms of approved or proposed federal, state or local land use plans, policies or controls.

SECTION III—*PROBABLE IMPACT OF THE PROPOSED ACTION ON THE ENVIRONMENT*

Again, as this document is meant to address only the nuclear aspects of weapons system storage, the following "propable" impacts are presented in turn:

A. *That an accident "might trigger a nuclear detonation thereby posing a risk" or expose the population to some "nuclear danger."*

(1) As previously stated, the design and structure of nuclear weapons will not permit an

accidental nuclear explosion or a nuclear contribution to the explosion of conventional explosives. This statement is applicable to both normal and abnormal situations.

(2) Prevention of accidental nuclear detonation is achieved by utilization of the highest state of technology available and through implementation of exhaustive, continuous quality assurance programs.

(3) Production of nuclear weapons is not approved by the government until the design satisfies all safety and performance criteria. Rigid adherence to all specifications and standards are enforced by federal agencies not only during production but also throughout the stockpile-to-target sequence (STS).

(4) The safety features incorporated in nuclear warhead design are dynamically tested. Test results have demonstrated and confirmed that all safety criteria have been satisfied or exceeded on all production weapons. Specific test details are classified SECRET Restricted Data.

(5) Nuclear Saftey Study Groups (NSSG) conduct periodic studies (an initial study prior to Navy acceptance, preoperational study prior to weapon employment and operational reviews thereafter) during which all primary and supporting systems, equipment and procedures utilized in the STS are extensively examined. These studies include transportation, handling, storage, facilities and weapon delivery systems. NSSG members are assigned from other Services, Defense Nuclear Agency, Department of Energy (DOE) and the Navy. Technical advisors are also assigned from various contractor and DoD laboratories and agencies and Navy fleet and shore activities. The studies verify weapon system design and operational safety and develop/verify mandatory safety rules for all nuclear weapon oper-

ations. These safety rules are formally coordinated with the DOE and the Joint Chiefs of Staff and approved by the Secretary of Defense prior to any Navy operations with the weapon.

(6) The safety studies are complemented by on-site inspections conducted at 12-18 month intervals of all Navy activities, ship and shore, that are involved with nuclear weapons. The inspections examine safety, security, technical and operational performance, training and emergency procedures (including accidents). Approximately 25 percent of these inspections are conducted by the Defense Nuclear Agency and the remainder by Navy teams permanently established for this purpose.

B. *That a nuclear weapon accident might result in a release of radiation that would endanger the population.*

(1) The relatively small amounts of conventional high explosives contained in nuclear weapons represents the primary hazard in a nuclear weapon accident.

(2) Release of radioactive material from a nuclear warhead can occur only if the nuclear warhead is ruptured. A rupture of the nuclear warhead is extremely unlikely since the warhead is designed to withstand considerable impact. Tests had confirmed that warheads will remain intact when dropped from heights much greater than those normally experienced in actual handling operations.

(3) In the event of a high explosure detonation, some plutonium material could be spread about the immediate area of the accident. This material will not cause radiological damage to personnel, regardless of one's proximity, if kept outside the body.

(4) Burning weapons, conventional or nuclear, may produce toxic or caustic gases. In addition,, if plutonium is involved in fire, radioactive particles will accompany the toxic or caustic gases in the smoke cloud. However, such smoke clouds are limited to the accident scene, quickly dissipate, and may constitute an internal hazard to personnel at the scene. The smoke should be avoided.

(5) Naval units and facilities incorporate the latest proven designs for enhancing safety and security of nuclear weapons. Moreover, the associated support systems (cranes, hoists, carriers, lifting fixtures, security systems, etc.) are certified under stringent quality control procedures, tested in accordance with rigid schedules and regularly inspected. Warhead storage areas are provided with either automatic water sprinkler/flooding systems or nitrogen inerting systems.

(6) Security of nuclear weapons is provided for by electronic sensors, communication systems, alarms, barriers, locking systems and special armed guards to maintain continual surveillance of warhead storage and handling spaces/areas. This special guard force and backup forces are in addition to the normal military security provided to weapon facilities or commissioned U.S. Navy ships.

(7) Navy nuclear weapon units and facilities are fully equipped and trained to successfully contain and remove any hazards or potential hazards that might result from an accident with a nuclear weapon. These response teams are regularly exercised and evaluated on this capability.

(8) The Navy does have plans for any emergency involving nuclear weapons which would be placed into effect for recovery from any accident. These plans provide for Nuclear Emergency Teams

and Explosive Ordnance Disposal Teams, which possess special qualifications and equipment, to be called upon for assistance in the event their services are required for decontamination or removal and disposal of contaminated material.

(9) Other agencies that are involved in rendering coordination assistance are: the Joint Nuclear Accident Coordinating Center, Navy Area Coordinators, other Services and the Interagency Committee on Radiological Assistance. The Interagency Radiological Assistance Plan (IRAP) describes the responsibilities and relationships of federal, state, and local health, police, fire and civil defense agencies and coordinates the resources of 13 federal agencies (Environmental Protection Agency; Department of Energy; Department of Health, Education, and Welfare; etc.)

C. *That there is danger of radiation escaping from nuclear weapons in storage.*

(1) Construction of nuclear weapons preclude leakage of radioactive material.

(2) There are short range, barely measurable above background radioactive emissions from some nuclear warheads. These emissions are not a hazzard and are confined to the immediate area of a unit. Personnel working in the confined spaces with such units wear radiation monitoring devices to insure that individuals do not receive cumulative exposure in excess of federal standards. When appropriate, sensitive equipment continually monitor weapon storage areas as an extra precautionary measure.

D. *Pursuant to the foregoing, it is concluded that:*

- Handling, storage and transportation of nuclear weapons present no hazards to the environment,

- Low level radioactive emissions from nuclear warheads are sufficiently low to pose no threat to the environment or to personnel health and safety, and

- Therefore, the nuclear aspects of weapons storage do not constitute an "environmental factor" per se, and can be excluded from any assessment prepared under the National Environmental Policy Act that addresses the conventional or construction aspects of ordnance storage handling facilities.

SECTION IV—ALTERNATIVES

None, as it is national policy to maintain an effective defensive posture, to include offensive capabilities. Safe, secure nuclear weapon capable ships and weapon storage and handling facilities are not only inseparable elements of this posture but also serve the best interest of the public.

SECTION V—PROBABLE ADVERSE ENVIRONMENTAL EFFECTS WHICH CANNOT BE AVOIDED

None; within the context of the subject addressed.

SECTION VI—RELATIONSHIP BETWEEN LOCAL SHORT TERM USES OF THE ENVIRONMENT AND THE MAINTENANCE AND ENHANCEMENT TO LONG TERM PRODUCTIVITY

Not considered applicable within the context addressed.

APPENDIX H

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This document consists of 162 pages
Number 955 of 1,250 Copies, Series A

CG-W-4

JOINT ERDA/DOD
NUCLEAR WEAPON CLASSIFICATION GUIDE

U.S. ENERGY RESEARCH and
DEVELOPMENT ADMINISTRATION

Division of Classification
Washington, D.C. 20545

Classified by:

/s/ John A. Griffin
JOHN A. GRIFFIN
Director
Division of Classification

CRITICAL NUCLEAR
WEAPON DESIGN INFORMATION
DoD DIR 5210.2

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23 MAR

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TOPIC	CLASS.	REMARKS
1700 STORAGE AND STOCKPILE		
1710 Planning Information		
1711 Planning or construction information revealing that installation is a nuclear weapon storage site	C-TS FRD	Special circumstances, such as international sensitivity of site location, will be considered in determining the level of classification.
1711.1 When purpose is not disclosed	U-TS NSI	X GDS 5(B)(3). Ordinarily unclassified. Classification may be required because of international commitments and sensitivity at a foreign location.
1720 Locations		
1721 Information revealing installation is a storage site for nuclear weapons, whether or not presence of weapons can be determined	C-TS FRD	Specifically, the term ISAS site: when used in conjunction with a unit designation and/or a geographical location in Europe, if classified at a minimum of S-FRD. Applies equally to permanent and temporary (field) installation. Special circumstances, such as international or domestic sensitivity of site location, will be considered in determining the level of classification. This does not apply to the fact of capability to store or handle nuclear weapons which is unclassified.
1722 Information revealing that an installation was a National Stockpile Site (NSS)	C FRD	
1723 That nuclear weapons are stored in any State without revealing a specification	U-C FRD	Classification of specific locations will be governed by the domestic political climate, the sensitivity of the site location, and in relation to national planning.

TOPIC		CLASS.	REMARKS
1700	**STORAGE AND STOCKPILE**		
1720	**Locations (continued)**		
1724	**Presence of nuclear weapons in countries other than U.S.A.**		International sensitivity of site location, local political climate, national and international military planning, and relation to U.S. strategic/tactical operations, will be considered in determining the appropriate level of classification.
1724.1	**In terms of a geographical area**	**U-TS FRD**	The fact that there are several thousand nuclear weapons in Europe and the fac that there are nuclear weapons in CINCPAC's area of responsibility is unclassified.
1724.2	**In terms of a regional defense organization**	**U-TS FRD**	Fact of nuclear weapons in NATO is unclassified.
1724.3	**In terms of a geopolitical unit (country; or United States possession, territories, or other areas under U.S. administra-administration)**	**C-TS FRD**	
1724.4	**In terms of specific locations defined above**	**C-TS FRD**	See Topics 1724, 1724.2 and 1724.3.
1724.5	**In terms of planning and negotiation**	**C-TS NSI**	X GDS 5(B)(3).

TOPIC	CLASS.	REMARKS
1700 STORAGE AND STOCKPILE		
1730 Capacity		
1731 Capacity in terms of quantity of specific types of nuclear weapons	**U-S FRD**	**Type refers to MK, B, or W number. If location is revealed, see Section 1720 and the remarks on Topic 1711.**
1732 Quantity of nuclear weapons actually at a site	**C FRD**	**If location is revealed, see Section 1720 and the remark on Topic 1711.**
1740 Security		
1741 Individual measures or protective devices employed	**U-S NSI**	**X GDS 5(B)(3).**
1742 Overall security measures for a site	**S-TS NSI**	**X GDS 5(B)(3). Includes plans, specifications, and detailed layout of protective alarm systems. May be RD or FRD if nuclear weapon emergency destruction plans are included.**
1743 Defensive plans for storage sites	**S-TS NSI**	**X GDS 5(B)(3). Segments of the plan may be assigned a lower classification. This can be determined by individual importance of successful completion of the overall plan.**
1744 Storage site vulnerability studies	**S-TS NSI**	**X GDS 5(B)(3).**
1744.1 Estimates of degree of vulnerability	**S NSI**	**X GDS 5(B)(3).**
1744.2 Methods to defeat security measures at nuclear weapon storage sites	**S NSI**	**X GDS 5(B)(3).**

TOPIC	CLASS.	REMARKS
1700 STORAGE AND STOCKPILE		
1740 Security (Continued)		
1745 Aerial photographs or other airborne imagery	U-TS NSI May be FRD	X GDS 5(B)(3). Classify in accordance with what individual photograph reveals, such as defense plans and the fact that they are nuclear weapon storage sites.
1750 Association with Operational Organizations in the United States or Overseas		When units cannot be identified as Nuclear Units or Nuclear Capable Units, information about these units will receive the normal security protection afforded like conventional units.
1751 That the U.S. has Nuclear Units and Nuclear-Capable Units among its operating force	U	
1751.1 Identification of these units as such by number, name, or other designation	U	Identification, per se, does not establish presence of nuclear weapons; when presence of nuclear weapons is established by other factors, classify information revealing movement/location of designated unit per applicable topic covering nuclear weapon locations.
1751.2 Information specifying the location of individual units	U-TS FRD	Unclassified if possession of nuclear weapons is not established. If possession is confirmed, classify accordingly. See Topic 1724 and its remarks.
1752 That a particular Nuclear-Capable Unit actually has nuclear weapons	C-TS FRD	The fact that SSBN's on patrol carry 16 missiles with nuclear warheads is unclassified. See Topic 1724 and its remarks.

TOPIC	CLASS.	REMARKS
1700 STORAGE AND STOCKPILE		
1750 Association with Operational Organizations in the United States or Overseas (continued)		
1753 Capacity of a Nuclear or Nuclear-Capable Unit in terms of numbers of each specific type of-nuclear weapon which can be delivered, handled, or stored	U-S FRD	See Topic 1724 and its remarks.
1753.1 Capacity of an aircraft or truck	U	
1754 That a Nuclear Unit actually has nuclear weapons	U-TS-FRD	The fact that MINUTEMAN and TITAN and SAFEGUARDS System missiles in silos have nuclear warheads in place or that aircraft units in CONUS known on an unclassified basis to be on nuclear alert have nuclear weapons in place is unclassified. In other cases, classify in accordance with numbers or location considerations covered by other topics in this section.
1755 Number of nuclear weapons in storage or with a Nuclear or Nuclear-Capable Unit	C-TS FRD	See Topics 1724 and 1754 remarks.

TOPIC	CLASS.	REMARKS
1700 STORAGE AND STOCKPILE		
1760 Missile Sites, U.S. Army		
1761 Locations	**U or S NSI**	**X GDS 5(B)(3). S only for military reasons contingent upon defense sensitivity of location of site. Normally unclassified. FRD if it reveals the location of a nuclear weapon storage site.**
1762 Number of launch pads or launchers	**U**	
1763 Number of nuclear warheads authorized per site	**U-C FRD**	**U for the SAFEGUARD System.**
1764 Number of nuclear warheads actually at site	**C-TS FRD**	**See Topics 1724 and 1754 remarks. May be TS if sensitive location information is revealed.**
1770 Missile Sites, U.S. Air Force		
1771 Locations	**U-C NSI**	**X GDS 5(B)(3). Location of missile launchers and control centers per se are classified only if expressed more precisely than to the nearest minute in North American Datum System coordinates. If classified location of nuclear weapons is included, see other topics in this section.**
1772 Numbers of launchers or launch pads	**U**	
1773 Number of nuclear warheads authorized per site	**C FRD**	

TOPIC	CLASS.	REMARKS
1700 STORAGE AND STOCKPILE		
1770 Missile Sites, U.S. Air Force		
1774 Number of nuclear warheads atcually at site	**C-TS FRD**	**See Topics 1724 and 1754 remarks. TS if sensitive location information is revealed.**
1780 Logistical Transportation and Accidents		
1781 The number of nuclear weapons involved in and the location of an accident	**U-TS FRD**	**Information releases that nuclear weapons are involved in an accident may be made at the lowest operating levels in accordance with ERDA and DOD instructions. Further information is released as unclassified after review of the circumstances of the accident.**
1790 Stockpile Quantities and Production Rates		
1791 The classification indicated in this section is based on information revealed by quantities only. Classification guidance for design information including nomenclature and storage site locations is provided in other topics of this guide		**See Topics 1720, 1760, and 1770.**
1792 Total stockpile quantities of all thermonuclear and fission weapons when the figures show the number of each weapon by specific wepaon type	**S FRD**	**Type refers to MK or W number.**

TOPIC	CLASS.	REMARKS
1700 STORAGE AND STOCKPILE		
1790 Stockpile Quantities and Production Rates (continued)		
1792.1 The stockpile quantities or production rates of a single weapon type	**S FRD**	
1793 Grand total quantity of nuclear weapons in stockpile when described as a collective figure only, e.g., "There is a grand total of X number of weapons in stockpile"	**S-FRD**	**However, the statement that we maintain a total number of nuclear warheads, tactical, as well as strategic, in the tens of thousands is unclassified.**
1794 Stockpile quantities of nuclear or nonnuclear components that reveal information classified by Topics 1792 and 1793	**S FRD**	
1794.1 Otherwise	**U**	
1795 Production rates for a period of one year or more of all thermonuclear and fission weapons when the figures show the number produced by each weapon by specific weapon type	**S FRD**	**Type refers to MK or W number.**

	TOPIC	CLASS.
1796	Production rates of all thermonuclear and fission weapons when given as a collective figure only, e.g., "the production rate for FY 19— is X number of weapons"	S FRD
1797	Production rates of nuclear or nonnuclear components that reveal information classified by Topics 1792 through 1796	S FRD
1797.1	Otherwise	U
1798	Random numerical identifiers of nuclear weapons or of nuclear weapon parts provided ratio to stockpile totals is not revealed	U

APPENDIX I

RESTRICTED DATA

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NAVY SWOP 55-1

TECHNICAL MANUAL

NAVY SECURITY CLASSIFICATION GUIDE FOR NUCLEAR WEAPONS (U)

Published under the authority of the Secretary of the Navy.

CLASSIFIED BY
CG-W-4 DATED
JULY 1974

[SEAL]

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ENCLOSURE (1) TO CNO LTR

SER 009D32/670212

23 MAR 1978

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TECHNICAL MANUAL

NAVY SECURITY CLASSIFICATION GUIDE FOR NUCLEAR WEAPONS

(TITLE UNCLASSIFIED)

PARAGRAPH CLASSIFICATION:

Pursuant to and in accordance with special authority granted by the Assistant Secretary of Defense (Comptroller), this technical manual is not paragraph-marked as otherwise would be required by DOD Directive 5200.1R.

CHANGE NOTICE

If required, upon insertion of this change into applicable publication, the copy number appearing on the replaced title page shall be transferred to the new title page.

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1 OCTOBER 1975

Change 2—15 September 1977

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Atomic Energy Act 1954
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DEPARTMENT OF THE NAVY
Washington, D.C., 1 October 197—

BY ORDER OF THE SECRETARY OF THE NAVY

OFFICIAL:

THOMAS L. ATCHISON
Lieutenant Commander, U.S. Navy
Naval Liaison Officer, JAWPS

FREDERICK H. MICHAELIS
Admiral, U.S. Navy
Chief of Naval Material

SECRET

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TOPIC	CLASSIFICATION	REMARKS
2-11.7 SECURITY.		
2-11.7.1 Individual measures or protective devices employed.	U-S	
2-11.7.2 Overall security measures for a site.	S-TS	Includes plans, specifications, and detailed layout of protective alarm systems. May be RD or FRD if emergency destruction plans are included.
2-11.7.3 Defense plans for storage sites.	S-TS	Segments of the plan may be assigned a lower classification. This can be determined by individual importance of successful completion of the overall plan.
2-11.7.4 Storage site vulnerability studies.	S-TS	
2-11.7.4.1 Estimates of degree of vulnerability.	S	
2-11.7.4.2 Methods to defeat security measures at nuclear weapons storage sites.	S	
2-11.7.5 Aerial photographs or other airborne imagery.	U-TS	Classify in accordance with what individual photograph reveals, such as defense plans and the fact that they are nuclear weapon sites.

APPENDIX J

[EMBLEM]

DEPARTMENT OF THE NAVY
OFFICE OF THE CHIEF OF NAVAL OPERATIONS
Washington, D.C. 20350

In Reply Refer To
OPNAVINST 5721.1C
OP-616

APR 28 1975

OPNAV INSTRUCTION 5721.1C

From: Chief of Naval Operations

Subj: Release of information on nuclear weapons and on nuclear capabilities of U.S. Forces

Ref: (a) OPNAVINST 8110.16C (Nuclear Weapon Accidents, Significant Incidents, and Incidents; notification procedures for)

1. *Purpose.* To promulgate regulations concerning release of information about nuclear weapons and nuclear capability of U.S. Forces, in order to implement the policy of the United States Government neither to confirm nor to deny the presence or absence of nuclear weapons or components on board any ship, station, or aircraft.

2. *Cancellation.* OPNAVINST S5721.1B of 22 June 1967 is cancelled and superseded by this Instruction.

3. *Information.* The requirements stated in paragraph 4 of this instruction are regulatory and mandatory. These requirements apply to and are binding upon all members of the naval service who are subject to the Uniform Code of Military Justice. Violation of any provision contained in paragraph 4 of

this instruction is punishable in accordance with the Uniform Code of Military Justice.

4. *Regulations*

a. No member of the naval service shall reveal, purport to reveal, or cause to be revealed any information, rumor, or speculation with respect to the presence or absence of nuclear weapons or components on board any ship, station, or aircraft, either on his own initiative or in response, direct or indirect to any inquiry. The spreading of inaccurate or distorted information with respect to the location of nuclear weapons or components may be as damaging to the United States as the revealing of accurate information. Accordingly, provisions of this paragraph apply without regard to the accuracy of such information, rumor, or speculation, and without regard to the belief of such member of the naval service as to the accuracy of such information, rumor, or speculation.

b. No member of the naval service who receives or is informed of any request, oral or written, for information or assurances with respect to the presence or absence of nuclear weapons or components on board any ship, station, or aircraft shall provide any such information or assurance. The only such information which may be provided in response to such a request is that it is the policy of the United States Government neither to confirm nor deny the presence or absence of nuclear weapons or components on board any ship, station, or aircraft.

c. The provisions of this paragraph continue to apply, notwithstanding the fact that certain weapons systems have been publicly identified as having nuclear capability, and notwithstanding any discussion in the press or in other media with respect to

the presence or absence of nuclear weapons or components on board any ship, station, or aircraft, or in any general location.

d. Any contemplated release of information of the type which is the subject of this instruction, shall be submitted—via appropriate military channels—to CHINFO for clearance. Such referral does not constitute violation of this instruction.

e. Notwithstanding the provisions of subparagraphs 4a, 4b, 4c, and 4d of this instruction, in the event of a nuclear weapon accident or significant incident, as defined in reference (a) [OPNAVINST 8110.16C], persons specified in reference (a) may, as described therein, officially confirm the presence of the weapon or component involved.

f. The provisions of this instruction shall not apply to any disclosures required by higher authority.

5. *Action*

a. All members of the naval services will comply with regulations contained in this instruction.

b. Commanders, commanding officers, and officers, and officers in charge will give this instruction the widest possible dissemination, ensure that each member of the naval service is aware of his responsibility to comply with the regulations contained in this instruction, and emphasizes the importance of such compliance to the national interest.

/s/ J. P. Moorer
J. P. MOORER
Deputy Chief of Naval
Operations
(Plans, Policy and Operations)

Distribution:
(See page 3)

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 337043 252

2-11 LOCATION, CAPACITIES, AND NUMBERS.

TOPIC	CLASSIFICATION	REMARKS
2-11.1 Planning or construction information revealing that an installation is a nuclear weapons storage site.	C-TSFRD	Special circumstances, such as international sensitivity of site location, will determine the level of classification.
2-11.2 Information revealing installation is a storage site for nuclear weapons, whether or not presence of weaspons can be determined.	C-TSFRD	Applies equally to permanent and temporary (field) installation. Specifically, the term 'SAS site," when used in conjunction with a unit designation and/or a geographical location in Europe, is classified at a minimum of SFRD. Special circumstances, such as international or domestic sensitivity of site location, will be considered in determining the level of classification. This does not apply to the fact of capability to store or handle nuclear weapons, which is unclassified (except as indicated in paragraph 1-3.3).
2-11.3 Information revealing that an installation was an NSS (National Stockpile Site).	CFRD	
2-11.4 The fact that nuclear weapons are stored in any state without revealing a specific location.	CFRO	Classification of specific locations will be governed by the domestic political climate, the sensitivity of the site location, and the relation to national planning.

TOPIC	CLASSIFICATION	REMARKS
2-11.5 The presence of nuclear weapons in countries other than the U.S.A.	U-CFRD	International sensitivity of site location, local political climate, national and international military planning, and relation to U.S. strategic/tactical operations will be considered in determining the appropriate level of classification.
2-11.5.1 In terms of geographical areas.	U-TSFRD	The fact that there are several thousand nuclear weapons in Europe and the fact that there are nuclear weapons in CINCPAC's area of responsibility are unclassified.
2-11.5.2 In terms of regional defense organizations.	U-TSFRD	The fact of nuclear weapons in NATO is unclassified.
2-11.5.3 In terms of geopolitical unit (country, U.S. possession, territories, or other areas under U.S. administration).	C-TSFRD	
2-11.5.4 In terms of specific locations defined above.	C-TSFRD	See paragraphs 2-11.5, 2-11.5.2, and 2-11.5.3.
2-11.5.5 In terms of planning and negotiating.	C-TSFRD	
2-11.6 CAPACITY.		

TOPIC	CLASSIFICATION	REMARKS
2-11.6.1 The capacity in terms of quantity of specific types of nuclear weapons.	U-SFRD	Type refers to Mk, B, or W number. If location is revealed, see paragraphs 2-11.2 and 2-11.5.
2-11.6.2 The quantity of nuclear weapons actually at a site.	CFRD	If location is revealed, see paragraphs 2-11.2 and 2-11.5.
2-11.6.3 The capacities of ships which are readily apparent from launcher tubes, deck drilling patterns, or other ship's construction.	U	
2-11.6.4 The stated capacities of individual ships, when such capacities are not readily apparent as in paragraph 2-11.6.3, or the various mixes of weapons authorized for ships.	CFRD	
2-11.6.5 Capacities stated in terms of CVA's, fleets, forces, or areas.	SFRD	
2-11.6.6 The numbers of nuclear weapons actually in storage in individual ships.	CFRD	
2-11.6.7 The total numbers of nuclear weapons within fleet, force, or type commands.	SFRD	
2-11.6.8 The capability of any ship, aircraft, or operating unit to stow, handle, launch, drop, place, or project nuclear weapons (except as indicated in paragraph 1-3.3).		

TOPIC	CLASSIFICATION	REMARKS
2-11.8 ASSOCIATION WITH OPERATIONAL ORGANIZATIONS IN THE UNITED STATES OR OVERSEAS.		When units cannot be identified as Nuclear Units or Nuclear-Capable Units, information about these Units will receive the normal security protection afforded like conventional units.
2-11.8.1 The fact that the U.S. has Nuclear Units and Nuclear-Capable Units among its operating forces.	U	
2-11.8.1.1 Identification of these units as such by number, name, or other desgination.	U	Identification, per se, does not establish presence of nuclear weapons; when presence of nuclear weapons is established by other factors, classify information revealing movement/location of designated unit per applicable topic covering nuclear weapon locations.
2-11.8.1.2 Information specifying the location of individual units.	U-TSFRD	Unclassified if possession of nuclear weapons is not established (except as indicated in paragraph 1-3.3). If possession is confirmed, classify accordingly.
2-11.8.2 The fact that a particular Nuclear-Capable Unit actually has nuclear weapons.	C-TSFRD	But the fact that SSBN's on patrol carry 16 missiles with nuclear warheads is unclassified.

	CLASSIFICATION	REMARKS
2-11.8.3 The fact that a Nuclear Unit actually has nuclear weapons.	U-TSFRD	The fact that MINUTEMAN, TITAN, and SAFEGUARD system missiles have nuclear warheads in place or that aircraft units in CONUS known, on an unclassified basis, to be on nuclear alert have nuclear weapons in place is unclassified. In other cases, classify in accordance with numbers or location considerations.
2-11.9 STOCKPILE QUANTITIES AND PRODUCTION RATES.		The classifications indicated in this paragraph are based on information revealed by quantities only. Classification guidance for design information, including nomenclature and storage site locations, is provided in other paragraphs of this guide.
2-11.9.1 Total stockpile quantities of all thermonuclear and fission weapons when the figures show the number of each weapon by specific weapon type.	SFRD	Type refers to Mk, B, or W number.
2-11.9.2 The stockpile quantities or production rates of a single weapon type.	SFRD	

TOPIC	CLASSIFICATION	REMARKS
2-11.9.3 The grand total quantity of nuclear weapons in the stockpile when described as a collective figure only; e.g., "There is a grand total of X number of weapons in the stockpile."	SFRD	However, the statement that we maintain a total number of nuclear warheads, tactical as well as strategic, in the tens of thousands is unclassified.
2-11.9.4 Stockpile quantities of nuclear or nonnuclear components that reveal information classified by paragraphs 2-11.9.2 and 2-11.9.3.	SFRD	Unclassified if such information is not revealed.
2-11.9.5 Production rates for a period of 1 year or more of all thermonuclear and fission weapons when the figures show the number produced of each weapon by specific weapon type.	SFRD	
2-11.9.6 Production rates of all thermonuclear and fission weapons when given as a collective figure only; e.g., "The production rate for FY 19— is X number of weapons."	SFRD	
2-11.9.7 Production rates of nuclear or nonnuclear components that reveal information classified by paragraphs 2-11.9.1 through 2-11.9.6.	SFRD	Unclassified if such information is not revealed.
2-11.9.8 Random numerical identifiers of nuclear weapons or of nuclear weapon parts, provided the ratio to stockpile totals is not revealed.	U	

Office-Supreme Court, U.S.
FILED
MAY 22 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1377

In the Supreme Court of the United States

OCTOBER TERM, 1980

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, ET AL.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

Petition Filed February 14, 1981
Certiorari Granted April 6, 1981

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The following items, which are a part of the Joint Appendix, are printed as appendices to the petition for a writ of certiorari:

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Court of Appeals Judgment (Appendix B, 8a);

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Environmental Impact Assessment (Appendix F, 17a–26a);

Candidate Environmental Impact Statement (Appendix G, 27a–35a);

Joint ERDA/DOD Nuclear Weapon Classification Guide (Appendix H, 36a–45a);

Navy Security Classification Guide for Nuclear Weapon (Appendix I, 46a–56a);

OPNAV INSTRUCTION 5721.1C (Appendix J, 57a–59a).

Relevant District Court Docket Entries

1978		
Mar 13	1	Complaint for Injunctive and Declaratory Relief and Summons issued
		* * *
Mar 29	12	Answer of Defendants
		* * *
1979		
Mar 5	28	Answer of Defendants, Secretaries of Defense and of Navy and Chief of Naval Operations
		* * *
Mar 5	31	Stipulation
		* * *
Mar 13	33	Findings of Fact and Conclusions of Law–cc: Zulkoski, Heen *TURRENTINE*
	34	Judgment–Pltfs' M/PI DENIED–cc: Zulkoski, Heen (CHINN)
		* * *
Apr 27	45	Notice of Appeal to the Court of Appeals–cc: Clerk, 9th CCA w/copy NA & docket entries, Zulkowski/Stearns, & Heen
		* * *
1980		
Oct 23	49	JUDGMENT–From the 9th CCA-REVERSED AND REMANDED *FLETCHER, MERRILL, SCHROEDER* cc: Judge King, Judge Turrentine U.S. Atty & Called U.S. Atty's & Life of the Land–(Mr.Zulkoski no Longer with Life of Land-as Pltf's Atty)

Relevant Court of Appeal Docket Entries

* * *

1980	
July 17	ORDERED OPINION (MERRILL) FILED & JUDG TO BE FILED & ENTD.
July 17	Filed opinion–reversed and remanded for further proceedings.
July 17	Filed & Entered Judgment.–rmc–
	* * *
Oct 10	Filed order (CMM, MMS & BBF) denying the petition for rehearing and rejecting the suggestion for a rehearing en banc. –rmc–
Oct 20	MANDATE ISSUED
	* * *
1981	
Apr 10	Filed certified copy of SC order of 4/6/81, granting cert. (panel notified) pn (copies to panel)

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF HAWAII

CIVIL ACTION
FILE NO. 78–0085

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, a non-profit Hawaii association; JAMES ALBERTINI; IAN YONGE LIND; EILEEN BELTON; PETER TAGALOG; ROGER SHEETZ; EDWARD CASEY; NORA OGAWA; AND LIFE OF THE LAND, a non-profit Hawaii corporation,
PLAINTIFFS,

v.

HAROLD BROWN, SECRETARY OF DEFENSE, W. GRAHAM CLAYTOR, JR., SECRETARY OF THE NAVY, JAMES L. HOLLOWAY, CHIEF OF NAVAL OPERATIONS, RALPH S. WENTWORTH, JR., COMMANDANT OF THE 14th NAVAL DISTRICT, AND THOMAS B. HAYWARD, COMMANDER-IN-CHIEF, PACIFIC FLEET, UNITED STATES NAVY,
DEFENDANTS.

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon WALTER P. ZULKOSKI, plaintiff's attorney, whose address 404 Piikoi Suit 209, Honolulu, Hawaii 96814, an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

WALTER A.Y.H. CHINN
Clerk of Court.

ORIETTE VEGAS
Deputy Clerk

Date: March 13, 1978

NOTE: This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO._____

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, a non-profit Hawaii association; JAMES ALBERTINI; IAN YONGE LIND; EILEEN BELTON; PETER TAGALOG; ROGER SHEETZ; EDWARD CASEY; NORA OGAWA AND LIFE OF THE LAND, a non-profit Hawaii corporation,
PLAINTIFFS,

v.

HAROLD BROWN, SECRETARY OF DEFENSE, W. GRAHAM CLAYTOR, JR., SECRETARY OF THE NAVY, JAMES L. HOLLOWAY, CHIEF OF NAVAL OPERATIONS, RALPH S. WENTWORTH, JR., COMMANDANT OF THE 14TH NAVAL DISTRICT, AND THOMAS B. HAYWARD, COMMANDER-IN-CHIEF, PACIFIC FLEET, UNITED STATES NAVY,
DEFENDANTS.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

I. *PRELIMINARY STATEMENT*

1. Plaintiffs bring this action to have this Court declare unlawful and enjoin Defendants' construction of an ammunition storage facility at West Loch, Oahu. Defendants have begun construction of a storage facility for conventional and nuclear weapons in West Loch without complying with the various federal and state laws designed to protect West Loch's environmental and cultural resources. Plaintiffs seek to have Defendants comply with the laws designed to protect West Loch and to cease their illegal activities which are potentially destructive to human life, wildlife, the land, and cultural heritage of the West Loch area.

II. *JURISDICTION*

2. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1331 (federal question), 1361 (mandamus) and

under 16 U.S.C. Section 1540 (endangered species). The amount in controversy herein exceeds the sum of $10,000 exclusive of interests and costs. A declaration of rights is sought under 28 U.S.C. Section 2201,2202.

3. Plaintiff's federal claims arise under the National Environmental Policy Act, 42 U.S.C. Section 4321 *et seq.*; The Endangered Species Act of 1973 16 U.S.C. Section 4901 *et seq.*; National Historic Preservation Act, 16 U.S.C. Section 470 *et seq.*; Executive Order 11593;

III. *PARTIES*

4. Plaintiff CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT is an unincorporated association composed of residents of the State of Hawaii with its office at 1918 University Avenue, Honolulu, Hawaii. Among the purposes of the organization are to do research and action to reduce the dangers to Hawaii residents and the world from nuclear weapons. Its members use the West Loch area for fishing and recreation.

5. Plaintiff, JAMES ALBERTINI, is a United States citizen who resides at 2812 Kahawai Street, Honolulu, Hawaii. He is coordinator of CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, and he has fished off the waters of Waipio peninsula since 1975.

6. Plaintiff IAN YONGE LIND is a United States citizen of Hawaiian ancestory, who has been a life long resident of Hawaii. He resides at 1139 9th Avenue, Honolulu, Hawaii. He flies regularly on commercial airlines that fly over the site of the proposed West Loch ammunition storage facility.

7. Plaintiff EILEEN BELTON, is a United States citizen and a resident of Hawaii. She presently resides at 91–385 Papipi Road, Ewa Beach, a community adjacent to the blast zone for the West Loch facility. She is presently a student at Leeward Community College.

8. PETE TAGALOG is a United States citizen and resides at 94–113 Leowaena Street, Waipahu, Hawaii. He is 46 years old, a life long resident of Waipahu, who has fished and crabbed in the waters and shore in the West Loch area

since 1942 and uses the catch therefrom to augment his family's food supply.

9. Plaintiff ROGER SHEETZ is a United States citizen who resides at 94–358 Kahuahele Street, Waipahu, Hawaii. He uses the West Loch area for recreational purposes including boating and crabbing.

10. Plaintiff, EDWARD CASEY, is a citizen of the United States, who resides at 66–377 B Haleiwa Road, Haleiwa, Hawaii. He is an instructor at Leeward Community College who jogs in the West Loch area, takes his students there, and uses the area for watching birds, especially the Hawaiian stilt, an endangered species.

11. Plaintiff NORA OGAWA, is a citizen of the United States, who is a life long resident of Hawaii. She resides at 94–514 Kamakahi Street, Waipahu, Hawaii. She fishes, clams and crabs in the West Loch area. She together with her family, use Waipio Peninsula and Ewa Beach Park for recreational purposes.

12. Plaintiff LIFE OF THE LAND, is a non-profit Hawaii corporation with its principal place of business at 404 Piikoi Street, Honolulu, Hawaii. The principal purpose of LIFE OF THE LAND is to preserve and protect the environment of the State of Hawaii. Its members live near the West Loch ammunition storage facility and they use the adjacent lands for recreational purposes.

13. Defendant HAROLD BROWN is Secretary of Defense and in said capacity he is responsible for the administration, direction, and control over the Department of Defense. Defendant W. GRAHAM CLAYTOR, JR., is Secretary of the Navy and under the direction and control of the Secretary of Defense, he is responsible for the policies and control of the Department of the Navy, including jurisdiction over the proposed West Loch storage facility. Defendant JAMES L. HOLLOWAY is the Chief of Naval Operations and under the control and direction of the Secretary of the Navy, he exercises command over the Operating Forces of the Navy. Defendant RALPH S. WENTWORTH, JR., is the Commandant of the 14th Naval District, the headquarters of which is Pearl Harbor,

Hawaii. In his capacity as Commandant, Defendant WENTWORTH exercises command of assigned naval shore activities within the district which includes the proposed West Loch facility. Defendant THOMAS B. HAYWARD is the Commander-in-Chief Pacific Fleet and in said capacity is the ultimate recipient of funds allocated by the United States Navy for naval operations on the proposed West Loch facility. Each of the Defendants is sued solely in his official capacity.

LEGAL CLAIMS

Claim One

NATIONAL ENVIRONMENTAL POLICY ACT

14. Pursuant to Section 102(c) of the National Environmental Policy Act (NEPA), 42 U.S.C. Section 4332 (c), agencies of the federal government are required to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" a detailed statement on the environmental impact of such proposals or actions.

15. Federal regulations implementing NEPA include in their definition of "actions" which may significantly affect the quality of the human environment "(r)ecommendations or favorable reports relating to legislation including requests for appropriations." (Emphasis added). 40 C.F.R. 1500.5.

16. Department of Defense regulations provide that environmental impact statements must be submitted with the Department's annual appropriation requests for all items in their budget and all actions by DOD components which are major actions having a significant effect on the environment or which are controversial not part of a plan; program or procedure that has had an EIS. 32 C.F.R. 214.6(d).

17. The funds which permit the United States Navy to build the West Loch ammunition storage facility are derived from a general fund entitled, "Operations and Maintenance, Navy (O&MN)" allocated to the Commander-in-Chief, U.S. Pacific Fleet.

18. The Operations and Maintenance, Navy fund is a federal appropriation requested annually by Defendants.

19. Defendants have assisted in the preparation of budget requests which have included funds to be used for building the West Loch facility. Defendants have not filed with such requests or at any time, the statutorily required environmental impact statements.

20. The building of the West Loch facility is under the supervision of the Defendants.

21. The building of the West Loch ammunition storage facility which is being done by Defendants is a major action having a significant effect on the environment and is controversial in nature.

22. In building the West Loch ammunition storage facility without submitting an environmental impact statement with their annual appropriation request for federal monies to fund such building or at any other time, Defendants are in violation of 42 U.S.C. Section 4332, 40 C.F.R. 1500.5 and 32 C.F.R. 214.6(d).

Claim Two

ENDANGERED SPECIES ACT OF 1973

23. Pursuant to Section 7 of the Endangered Species Act of 1973, Defendants are required to carry out programs for the conservation of endangered species and threatened species. 16 U.S.C. Section 1536.

24. Pursuant to Section 7 of the Endangered Species Act of 1973, Defendants are required to take such actions as are necessary to insure that actions authorized by them do not jeopardize the continued existence of endangered and threatened species. 16 U.S.C. Section 1536.

25. Pursuant to Section 7 of the Endangered Species Act of 1973, Defendants are required to take such actions as are necessary to insure that actions authorized by them do not result in the destruction or modification of the critical habitat of any endangered or threatened species.

26. Defendants have violated Section 7 of the Endangered Species Act of 1973 with regard to building of the West Loch ammunition storage facility in that:

(a) Defendants have neglected to carry out any program for the conservation of endangered and threatened species which may exist on or near the facility.

(b) Defendants have neglected to take necessary actions to insure that their operations do not jeopardize the continued existence of endangered and threatened species which may exist on or near the facility and

(c) Defendants have neglected to take necessary actions to insure that their operations do not result in the destruction or modification of habitat of endangered or threatened species which may be critical to the survival of said species.

27. Some or all of the species listed in Exhibit "A" attached hereto exist on or about the West Loch facility and are adversely affected by Defendants actions.

28. The species listed in Exhibit "A" have been nominated as eligible for listing as endangered, and threatened species and therefor eligible for protection under the aforementioned Act.

Claim Three

PRESERVATION OF HISTORIC SITES & EXECUTIVE ORDER NO. 11593

29. The United States Congress has statutorily declared "that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people." 16 U.S.C. Section 470, 470(f).

30. Plaintiff LIND is an American citizens of Hawaiian descent whose historical and cultural foundations extend to the area of the West Loch facility.

31. The site of the West Loch facility contains sites and objects which are of historical, religious and cultural significance to the above-named Plaintiffs and other individuals of Hawaiian descent.

32. Pursuant to Executive Order No. 11593, (May 13, 1971), note to 16 U.S.C. Section 470, Defendants are, as a matter of policy, required to administer the cultural properties under their control "in a spirit of stewardship and trusteeship for future generations."

33. Pursuant to 16 U.S.C. Section 470(f) the Defendants are required to take into account prior to the approval of any expenditure of Federal funds, the effect their undertaking will have on any site, building, structure, or object that is included in the National Register and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to such undertaking.

34. Defendants have authorized the building of the West Loch ammunition storage facility which is inherently destructive to all sites, buildings, objects, and structures which may exist there, without allowing the Advisory Council to comment on taking such sites, buildings, objects, and structures into account in violation of Executive Order 11593, and 16 U.S.C. Section 470(f).

Claim Four

ADMINISTRATIVE PROCEDURES ACT

35. Pursuant Section 706 of the Federal Administrative Procedures Act, Defendants may not pursue actions that are "arbitrary and capricious." 5 U.S.C. 706(2)(a).

36. Defendants have failed to follow the requirements of the National Environmental Policy Act, the Endangered Species Act of 1973, the National Historic Preservation Act of 1966, and Executive Order No. 11593 in constructing a nuclear weapons storage facility at West Loch, even though such construction is a major federal action that would have a significant effect on the environment and is controversial.

37. Defendants failure to follow the above Acts and Order in the construction of the West Loch ammunition facility constitutes arbitrary and capricious action in violation of the Administrative Procedures Act 5 U.S.C. 706(2)(a).

IRREPARABLE INJURY

38. Plaintiff's are suffering and will continue to suffer irreparable injury by reason of Defendants continued building of the West Loch facility which inherently will endanger the environment, lives, and historic sites.

39. Plaintiff's have no plain, adequate or speedy remedy at law to redress such injury and deprivation and therefore

bring the suit for declaratory and injunctive relief as their only means of securing such relief.

Wherefore, Plaintiff's pray that this Court:

A. Preliminarily and permanently enjoin the Defendants, their agents, and assignees from building the West Loch facility until Defendants have complied with the requirements of the National Environmental Policy Act, the Endangered Species Act of 1973, Executive Order 11593, the National Historic Preservation Act of 1966, and the regulations promulgated thereunder.

B. Preliminarily and permanently enjoin Defendants, their agents, and assignees from failing to perform all acts required by the National Environmental Policy Act, the Endangered Species Act of 1973, Executive Order 11593, the National Historic Preservation Act of 1966, and the regulations promulgated thereunder.

C. Declare that Defendants are in violation of those statutes, regulations and orders listed in paragraph "A" of this prayer for relief.

D. Allow Plaintiffs their costs and attorneys fees and grant them such relief as the Court may deem just and appropriate.

DATED: Honolulu, Hawaii March 13, 1978.

WALTER P. ZULKOSKI
FRED BENCO
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 78-0085

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, ET AL.,
PLAINTIFFS,

v.

HAROLD BROWN, ET AL.,
DEFENDANTS.

ANSWER OF DEFENDANTS

Comes now RALPH S. WENTWORTH, Jr. and THOMAS B. HAYWARD, defendants herein, by and through their undersigned attorneys, who in answer to the Complaint for Injunctive and Declaratory Relief state as follows:

1. Defendants admit that the Department of the Navy has commenced construction of an ammunition storage facility at West Loch, Oahu. Each and every other allegation as set forth in paragraph 1 of the complaint is denied.

2. Defendants admit the allegations as contained in paragraphs 14, 15, 18, 23, 24, 25, 28, 29 and 32 of the complaint.

3. The defendants deny each and every allegation as set forth in paragraphs 2, 3, 21, 22, 26, 30, 31, 34, 35, 36, 37, 38 and 39 of the complaint.

4. Defendants are without knowledge and information sufficient to form a belief as to the truth of the allegations as contained in paragraphs 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the complaint, and to the extent an answer is required, each and every allegation as contained therein is denied.

5. Defendants admit the allegations as contained in paragraph 13 of the complaint, however, defendants deny that in the capacity of Commandant, defendant Wentworth exercised his command of assigned naval shore activities

within the district. Rear Admiral Wentworth is Commander, Naval Logistics Command, U.S. Pacific Fleet, and in that capacity has no authority to suspend construction of the ammunition storage facility at West Loch, Oahu. Defendants further deny that defendant Hayward is a recipient of funds allocated by the United States Navy for naval operations on the proposed West Loch facility. Furthermore, defendants deny that defendant Hayward has authority to suspend the construction of the West Loch facility. Only after completion of the construction of the ammunition storage facility at West Loch, Oahu, would defendants Wentworth and Hayward become responsible for the use of the facility.

6. Defendants in answer to the allegations as contained in paragraph 16 of the complaint deny that 32 CFR 214.6(d) requires submittal of an Environmental Impact Statement. That provision requires the assessment of the environmental consequences and only "if it is determined that the proposal would significantly affect the environment and EIS is required and shall be submitted with the proposal." Therefore, each and every allegation as contained in paragraph 16 of the complaint is denied.

7. Each and every allegation as contained in paragraph 17 of the complaint is denied. Only $127,000.00 is derived from operations and maintenance. Navy funds, allocated to the Commander, Naval Electronics Systems Command, who in turn allocated them to the Commanding Officer, Naval Shore Electronics Engineering Activity, Pacific who in turn allocated it to the Commander, Pacific Division, Naval Facilities Engineering Command and thence to the Officer in Charge of Construction, Naval Facilities Engineering Command Contracts, Mid Pacific.

8. Defendants in response to the allegations as contained in paragraph 19 of the complaint admit that the defendants have assisted in the preparation of budget requests which have included funds to be used for building the West Loch facility. Each and every other allegation as contained in paragraph 19 of the complaint is denied.

9. Defendants in answer to paragraph 20 of the complaint admit the building of the West Loch facility is under the su-

pervision of defendants Brown and Claytor, but deny that the construction of the aforesaid facility is under the supervision of defendants Holloway, Hayward and Wentworth.

10. Defendants in answer to paragraph 27 of the complaint admit that some of the species listed in Exhibit A attached to the complaint exist on or about the West Loch facility some of the time. However, defendants deny that any of the species so listed are adversely affected by the construction of the ammunition storage facility at West Loch, Oahu.

11. Defendants in answer to paragraph 33 of the complaint admit that 16 USC 470(f) requires federal agencies "prior to the approval of the expenditure of any federal funds on the undertaking . . . take into account the effect of the undertaking on any district, site, building, structure or object that is included in the National Register and afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking." Defendants deny each and every other allegation as contained in paragraph 33 of the complaint and that the Ordnance Storage Facility site is contained within the boundary of any site listed on the National Register.

SECOND DEFENSE

The court lacks jurisdiction over the named defendants.

THIRD DEFENSE

The plaintiffs lack standing to bring the instant law suit.

FOURTH DEFENSE

The National Environmental Protection Act does not apply to classified military projects.

FIFTH DEFENSE

The plaintiffs' are guilty of laches.

SIXTH DEFENSE

The plaintiffs have not and will not suffer irreparable damages.

SEVENTH DEFENSE

The court lacks jurisdiction over the subject matter in that plaintiffs have failed to file the requisite bond.

EIGHTH DEFENSE

Plaintiffs have failed to join indispensable parties.

NINTH DEFENSE

Plaintiffs have failed to state a cause of action upon which relief can be granted.

TENTH DEFENSE

This court lacks jurisdiction over defendants Harold Brown, W. Graham Claytor, Jr., and James L. Holloway due to the insufficiency of service of process upon them.

WHEREFORE, defendants pray that the complaint be dismissed and that the defendants be awarded their costs and attorney's fees and any other relief deemed appropriate.

DATED: March 28, 1978, at Honolulu, Hawaii.

HAROLD M. FONG
United States Attorney
District of Hawaii

By_____
WILLIAM J. EGGERS III
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 78-0085

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, ET AL., PLAINTIFFS,

v.

HAROLD BROWN, ET AL., DEFENDANTS.

STIPULATION

IT IS HEREBY STIPULATED by the parties through their respective attorneys, that:

I. Complaint

a. If Plaintiffs were called to testify, they would testify as stated in paragraphs 4 thru 12 of the Complaint.

b. Paragraph 14 of the Complaint is admitted to read as follows:

> Defendant Harold Brown is Secretary of Defense and in said capacity he is responsible for the administration, direction and control of the Secretary of Defense. He is responsible for the policies and control of the Department of the Navy, including jurisdiction over the proposed West Loch storage facility. Defendant Thomas B. Hayward is the Chief of Naval Operations and under the control and direction of the Secretary of the Navy. He exercises command over the operations forces of the Navy. Defendant Ralph S. Wentworth, Jr., is the Commandant of the 14th Naval District, the headquarters of which is Pearl Harbor, Hawaii. In his capacity as Commandant, Defendant Wentworth exercises coordination of assigned naval shore activities within the district which includes the proposed West Loch facility. Defendant Admiral Donald C. Davis is the Commander-in-Chief Pacific Fleet and in such capacity is the recipient of funds allocated by the United States Navy for naval operations on the proposed West Loch facility. Each of the Defendants is sued solely in his official capacity.

c. Paragraphs 14, 15, 18, 23, 24, 25, 28, 29, 32, 33, 35 of the complaint are admitted by Defendants.

d. That part of paragraph 27 is admitted which states "Some or all of the species listed in Exhibit 'A' attached hereto exist on or about the West Loch facility. . . ."

e. In paragraph 30, if called to testify Plaintiff Lind would state that he "is an American citizen of Hawaiian descent whose historical and cultural foundations extend to the Okiokiolepe Fish Pond. He would also testify in paragraph 31 that the Okiokiolepe Fish Pond is of historical, religious and cultural significance to him and, he feels, other individuals of Hawaiian descent.

f. Paragraph 34 is amended and admitted to read:

> Defendants have authorized the building of the West Loch ammunition storage facility without requesting the Advisory Council on Historic Preservation to comment on the facility's effect on the Okiokiolepe Fish Pond.

II. Answer

The Defendants answer is amended to include Defendants Brown, Claytor, and Davis.

III. Prior Evidence Made A Part Of This Record

a. All persons exc. J.A. & I.L. who have made affidavits in support of the earlier Motion for Preliminary Injunction of the Motion to Dismiss or in the Alternative for Summary Judgment would testify to the matters contained therein if called to testify.

b. No objection is made to the transcript of the hearing on the Motion for Preliminary Injunction being admitted as evidence.

c. No objection is made to the environmental assessment for the West Loch facility, attached as Exhibit 'A' to Plaintiffs' Motion for Preliminary Injunction, being admitted as evidence.

d. No objection is made to the Candidate Environmental Impact Statement attached being admitted as evidence.

e. The following exhibits attached to Plaintiff's Motion for Preliminary Injunction are authentic: B thru and including K; L as a Resolution submitted but not adopted by the Hawaii State Legislature; the second page of Exhibit N; O thru Q.

f. All exhibits attached to Defendants' Motion to Dismiss or in the Alternative for Summary Judgment are authentic.

g. All exhibits that Plaintiffs plans to submit are authentic.

IV. Facts Not In Dispute

a. The West Loch ammunition storage facility is capable of storing and maintaining nuclear weapons, when, as and if needed.

b. 1. DOD has publicly acknowledged following occurrencies: On January 17, 1966, an American B–52 bomber collided with a KC–135 refueling tanker causing the deaths of crewmen and the loss of unarmed nuclear weapons.

2. On March 11, 1958, a B–47 bomber accidently dropped an unarmed nuclear weapon in the megaton range over South Carolina. A explosion of conventional explosives occurred.

3. On June 7, 1960, at McGuire Air Force Base, a fire occurred at a launch shelter of a Bomarc Missle. One missle exploded. Some radiation was scattered.

4. In 1961, in over North Carolina a B–52 bomber (had to dropped jettison) a nuclear bomb of unknown megatonage. The bomb was buried in the earth and the explosive parts were recovered.

5. On January 21, 1968, a B–52 attempting an emergency landing at a U.S. Air Force Base in Greenland crashed, breaking or destroying nuclear weapons. A radioactive contaiminated area resulted.

DATED: Honolulu, Hawaii, March 4, 1979

/s/ _____

WALTER P. ZULKOSKI
Attorney for Plaintiffs

ELLIOTT ENOKI
Attorney for Defendants

MURRAY NASH

was called as a witness by the Plaintiffs, having been duly sworn, testified as follows:

THE CLERK: State your name, address, and spell your last name.

THE WITNESS: My name is Murray Nash. I live at 10800 Blossom Lane, Silver Springs, Maryland. My last name is spelled N-a-s-h.

DIRECT EXAMINATION

BY MR. ZULKOWSKI:

Q Mr. Nash, I show you a diagram. It is dated or entitled "Statement of Murray L. Nash." Are you familiar with that document?

A Yes, I am.

Q Did you prepare it as a part of this litigation?

A Yes, I did.

Q It states in the document that you are the Deputy [214] Director, Office of Classification, Department of Energy.

A That's correct.

Q And that you are responsible for formulating the rules and regulations for the classification of scientific and technical information which may be categorized as restricted data, formerly restricted data, and national security information. Is that accurate?

A That's right.

Q Are those classifications that your office prepares, are those classifications binding on the various services, Department of Defense, the Military, Navy, Army?

MR. ENOKI: I object. It calls for legal opinion.

THE COURT: Sustained.

Q (By Mr. Zulkowski) Whenever you prepared these rules and regulations, to the best of your knowledge, who do you prepare them for?

A It is prepared for the users in the atomic energy industry.

Q That would include anyone in the atomic energy?

A Anyone dealing with classified information.

Q Regarding atomic energy?

A Right.

Q Would that include atomic weaponry?

A Yes.

Q In the course of your work, have you ever prepared [215] rules and regulations that you have sent to the departments, either the Department of Defense or the Navy?

A That I have sent to them?

Q Yes.

A Certainly. Many of those rules are jointly prepared with the department.

Q Have you been here throughout the length of this hearing, from yesterday morning on?

A Yes, I have.

Q You have heard the various testimony in the case?

A Yes, I have.

Q Were you consulted at all in the preparation of answers to an item that we served on the other side calling for the request for documents?

A No, I was not.

Q You weren't consulted at all in the preparation of that document?

A No, sir.

Q To quote from that document, we requested information regarding the highly determined radiological—excuse me—a radiation accident—radiation accident potential. Is that classified information?

A I don't know what the term means.

Q Would you be familiar with a similar term?

A I don't know what you are referring to, counsel.

[216] Q Are you familiar with the fact that whenever an ammunition storage facility is constructed, that the facility, determining where to locate the facility; two determinations are made: one, what a conventional blast arc would be, and secondly, where radiation accident potential would be?

A I don't have any knowledge about how to construct such a site.

Q In the testimony yesterday, there was a safety officer, Mr. Ornellas, on the stand and he stated that his base kept various accident reports on accidents involving the ground vehicles on the base. Would that be classified information?

A As I understood his testimony, he testified that he was only concerned with ordinary conventional traffic-type hazards and accidents. And no, that wouldn't be classified.

Q Would that be classified—should that be unclassified with regard to what those vehicles may be carrying?

A The accident per se, yes. I mean, if a car runs into a tree and you report that as an accident; there is nothing classified about it, no matter what it carries.

Q So if an accident occurs with the vehicle carrying, let's say, nuclear weapons; there is nothing preventing disclosure of the fact that that accident has happened, is there?

A Not just the accident, that is right.

Q But the details of the nuclear weapon, that is something [217] else?

A That is something else.

Q But the statistics is no problem is there?

A I don't see any.

Q What about the incidents of airplane accidents in, let's say, the State of Hawaii? Is there any reason why that should be classified information, just the statistical reports of how many occurred and over what period of time?

A I really don't know what the rules governing that is by the Department of Defense.

Q But from your personal knowledge and your personal experience, is there any reason why that should be classified?

A I know of no reason why that should be classified, just the mere occurrence of an accident, that is an airplane accident.

Q What about where that accident occurred?

A Same answer.

Q No problems with that?

A No.

Q Also, we had testimony yesterday by one of the Defendants' witnesses regarding, at least on his base, a number of, quote, nuclear incidents that occurred. I believe his statement was two a year. In fact, he described two. Is there any reason why that information shouldn't be released?

A I don't know under what sort of restrictions Capt. [218] Butrym operates. It is a hypothetical question as far as I am concerned.

Q Based on what you heard yesterday, the kind of information he did reveal, is there any reason why that information should be classified?

A I really don't know. I don't know. There are, you know—I am not trying to evade your question, but I don't want to give an answer which would be misleading. I just don't know.

Q He testified two occurred per year. Is there anything—you are the one who is in charge of determining whether this information is classified or unclassified, am I correct?

A I am charged with the responsibility, part of the responsibility for formulating rules. I am not charged with the responsibility for giving specific answers to specific questions.

Q So if you are going to formulate a rule and formulating a rule about statistics about nuclear accidents, would you formulate a rule saying that the number of incidents

that occurred in a particular year should be classified information?

MR. ENOKI: I object. Calls for a hypothetical. Posing a hypothetical fact not in evidence.

THE COURT: Let's see if the witness can answer.

A I wouldn't have any objection to that.

[219] Q (By Mr. Zulkowski) You wouldn't have any objection to that?

A No. Now, I could be pursuaded otherwise by the factors of which I am not aware; but answering that hypothetical question as you put it, I would have no objection to it.

Q In your statement you list a number of reasons of why an environmental impact statement can be done. I am assuming these are pretty blanket rules you apply here, is that accurate?

A No, they are not so blanket. What they refer to is one, we can, A, neither confirm nor deny that weapons are stored at any location; secondly, what they also say is that the design of atomic weapons is restricted data according to the Atomic Energy Act, and they can't be discussed or divulged to any third people.

Q That is the basis of your testimony?

A That's right.

Q If it has already been admitted by the Department of Defense there is a possibility of plutonium dispersal, there is no reason why the pattern of that dispersal should be anything that could be classified, assuming a minimum amount of plutonium is required for nuclear detonation?

MR. ENOKI: I object. That question is compound and ambiguous.

[220] MR. ZULKOWSKI: I will rephrase it, your Honor.

THE COURT: Very well. Do you understand the question?

THE WITNESS: No, I don't, your Honor.

THE COURT: Very well. Try again. Try again, counsel.

Q (By Mr. Zulkowski) Assuming that the defense has admitted a plutonium dispersal can occur at a nuclear weapons site and assuming that the scientific information is that the minimum amount of plutonium required to make a bomb is three hundred grams, would there be any reason to classify what effect dispersing three hundred grams of plutonium into the air would have on the surrounding area?

A I don't think I can answer that question because the speculation of how much material is necessary to make a bomb is classified in itself.

Q Again, I am assuming that that scientific evidence says there is no way you can have a nuclear explosion unless you have a critical amount, three hundred grams of plutonium?

A Right.

Q That is basically a scientific fact. We are not talking about any restricted data?

MR. ENOKI: I object to counsel testifying at this point.

THE COURT: The question is never evidence, counsel. You know that. Can you answer the question?

THE WITNESS: No. I wish he would rephrase it.

[221] Q (By Mr. Zulkowski) Okay. I will try again. Again, we have a certain amount of plutonium that is required to make a bomb.

A Right

Q That is a given. Now, if that were dispersed in the air, is there any reason why just that dispersal should be classified information?

A No.

Q That is something you could look into in the environmental impact statement.

A Unless you got into quantities, which it could not.

Q Also, the effect of a possible aircraft accident on the site, there is no reason why the possible effect of that ought to be classified?

A I don't know. I just don't know because I don't know what the effects would be.

Q What about the discussion of what possible effects could occur? Let me rephrase that.

Again, we are doing a hypothetical. Assuming a plane crashes and burns. There is no reason why an impact statement couldn't determine what would happen to the plane whenever it hit the ground, is that correct?

A That's right.

Q What effects—

A I assume it would break up.

[222] Q But what effects it may have on the surrounding area may be classified. The fact it hits the ground and explodes, it burns, whatever; there is no reason why you couldn't discuss that in the environmental impact statement?

A That's right.

Q Are you aware of the fact that on various military projects like the MX Missile System, the Triton Submarine Base, the environmental impact—

MR. ENOKI: I object. I object. This is beyond the witness' personal knowledge.

THE COURT: Do you have any personal knowledge?

THE WITNESS: I was going to say I just don't know, your Honor.

THE COURT: That is the answer.

Q (By Mr. Zulkowski) Given that we can't pinpoint because of security reasons where we keep our atomic weapons, there is no reason why we can't discuss the environmental impact if, assuming there is a possibility it may be stored in an area, is that accurate?

A That is again a very hypothetical question. That would depend on the circumstances.

Q It depends?

A We have the assessment which is part of the testimony. I think that is about as far as you can go.

Q Things have already been done?

[223] A I would say that there is a limit to which you can go.

Q That is as far as you can go, the assessement?

A Right.

Q I can't go any further than that?

A No, because I think after that you just start getting too specific.

Q That is your professional opinion?

A That is my opinion.

Q Have you had something called a candidate EIS?

A Yes, I have.

Q That has gone substantially farther than the environmental assessment, hasn't it?

A Yes, it has.

(Whereupon, Mr. Zulkowski and Mr. Albertini confer.)

Q (By Mr. Zulkowski) Are you familiar with the classification of a nuclear accident and nuclear incident?

A Not as such, no.

Q Are there other terms that you use?

A No. I know what you mean.

Q You know what I mean.

Q Yes.

A Is there any reason to classify just the occurrence of a nuclear accident?

A Personally, I don't see of any; but there may be [224] reasons that other people may have that I am not aware of.

Q Any professional—

A I don't see any reason offhand.

Q Is that the same with the nuclear incident?

A Yes.

(Whereupon, Mr. Zulkowski and Mr. Albertini confer.)

THE COURT: I take it you have no questions, counsel?

(Whereupon, Mr. Zulkowski and Mr. Albertini confer.)

Q (By Mr. Zulkowski) Are you familiar with the term formerly restricted data?

A Yes.

Q Can you just define that?

A Formerly restricted data is a rather oddball name. It refers to restricted data which the Department of Energy, formerly the Atomic Energy Commission and the Department of Defense have both jointly determined can be adequately protected as national security information when that information is in the United States. But it reverts to the former restricted data categorization if it is transferred outside the United States, say to NATO or in a national organization that we deal with. But it is really restricted data.

Q I believe it was in your statement that you mentioned that nine pages of information were declassified just for the suit?

A Yes.

[225] Q What are those nine pages of information?

A These were pages that refer to the classification rules governing the location of stockpile sites primarily and numbers of weapons stored there.

Q Do you know whether or not those are in evidence?

A I don't believe they are.

Q Would you be able to without breaching your security or your classification system discuss the effects of nuclear weapons storage site, assuming you don't admit that is going to be a site?

A I really don't understand. Discuss it in what way?

Q Discuss the possible effects of, say, a nuclear weapons detonation.

A I'm not qualified to discuss that.

Q In terms of classifying information, do you tend to or would you rather—do you tend to, say, overclassify rather than underclassify?

A No, sir. We are prohibited from doing that by Execu-

tive Order. I refer to Executive Order 12065 that specifically says that shall not be done. That is a no-no.

Q Just the way you classify—how long have you been classifying—

THE COURT: Counsel, this doesn't tend to prove or disprove any of the issues in this case. I have given you a long leeway with this expert. Let's bring your examination [226] to a close unless you get into questions that pertain to the decision I have to make.

MR. ZULKOWSKI: We have no further questions, your Honor.

THE COURT: Very well. I think that is sufficient.

MR. ENOKI: I just have one question.

THE COURT: Very well.

CROSS-EXAMINATION

BY MR. ENOKI:

Q Mr. Nash, are there other Departments of Defense, that is Army, Navy, or Air Force, reguations that also supplement the classifications that you use?

A Yes. They usually issue their own instructions to implement the general instructions.

MR. ENOKI: Thank you. I would also like to introduce Mr. Nash's testimony since it has been referred to.

MR. ZULKOWSKI: No objection, your Honor.

THE COURT: It will be received as marked. Do you have any recross on questions asked by counsel? Very well. You may stand down.

MR. ENOKI: Mr. Nash's statement marked D5.

THE COURT: D5?

MR. ENOKI: Yes.

THE COURT: Thank you. Next witness, counsel.

MR. ZULKOWSKI: My next witness I call Dr. Helen Caldicott, your Honor.

THE COURT: Very well.

Whereupon.

DR. HELEN MARY CALDICOTT,

was called as a witness by the Plaintiffs, having been duly sworn, testified as follows:

THE CLERK: State your name, your address, and spell your last name.

THE WITNESS: My name is Helen Mary Caldicott and I live at 1445 Commonwealth Avenue, West New Town, Massachusetts 02165.

Q The spelling of your last name.

THE WITNESS: C-a-l-d-i-c-o-t-t.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MR. ZULKOWSKI:

Q Showing you Plaintiff Exhibit P30, Affidavit of Rosalie Bertell, John Gofman, and two chapters from your recent book; do you adopt those as accurate and true information.

A Yes, I do.

Q You had an opportunity to read over all of that, [97] haven't you.

A Yes.

THE COURT: It is all contained in Exhibit 30, counsel.

MR. ZULKOWSKI: It is, your Honor.

THE COURT: Thank you.

MR. ENOKI: Excuse me. I didn't hear.

MR. ZULKOWSKI: Documents of Bertell—

MR. ENOKI: I don't know whether the Court wants me to object now.

THE COURT: List your objections, counsel.

MR. ENOKI: Excuse me.

THE COURT: List your objections. I see there are a number of pages there. I want your objections.

MR. ENOKI: The objection is to the attachments which I believe are articles by Dr. or Mr. or Dr. Gofman, G-o-f-m-

a-n—I object on the grounds—first of all, lack of foundation, which I assume counsel will try to lay; secondly, that the witness is not qualified to adopt these as her opinions; thirdly, they are hearsay as they are Dr. Gofman's opinions; fourthly, they are irrelevant, especially in relation to the second article that deals with fallout, which I don't know what has to do with this case. Those are my objections.

THE COURT: Very well. Let's proceed.

MR. ZULKOWSKI: Your Honor, can I move this around because Dr. Caldicott wants to use the blackboard.

[98] Q (By Mr. Zulkowski) Have you read the environmental impact statement the Navy has prepared.

A I have.

Q Can you give your reaction to that statement.

A Well, I think it doesn't address adequately the problems of plutonium dissipation in the event of accident explosion or fire, nor does it address adequately the medical implications of plutonium to a populous.

Q What are those medical implications.

A I need to use the blackboard.

Q Please.

A Now, there are several problems with this from a physician's point of view. First, I think I should address the fact that it is possible that nuclear weapons can in fact, if they are dropped from airplanes or if they are burned or involved in explosions, can in fact produce a nuclear yield. According to a document published by the AEC and the Defense Department entitled "The Effects of Nuclear Weapons," which says that in the event of a crash, fire, or explosion, or other stressful situations when weapons were tested, there were at least 19 cases that produced immeasurable nuclear yields.

As these weapons are placed in the path of the major airports here, it is possible that there could occur a crash. There could be an explosion of conventional weapons [99] as they are stored near conventional weapons. And there are

conventional explosions within nuclear weapons, themselves. There could well be a fire.

And in the Department of Army, Navy, and Air Force publication of plutonium contamination standards, they talk about thermoelectric sources using plutonium 238, which is used to produce electricity.

MR. ENOKI: Your Honor, I am going to object further. This is just a statement. I think the question of counsel was how she got to the medical aspects of plutonium. I don't know how we wound up with airports and crashes.

THE COURT: Let's get back to the question.

MR. ZULKOWSKI: Your Honor, just for the Court's information, the document she originally referred to is Plaintiffs' Exhibit 17. It is already in evidence.

Q (By Mr. Zulkowski) Go into the medical implications of either an explosion or release of plutonium.

A First of all, I will talk about the medical implications of a nuclear explosion and then I will talk about the medical implications of release of plutonium on a population.

Depending upon the size of the explosion, and apparently it can be an explosion of 13 kilotons. What would that mean? There would be a large fire storm first which is medically dangerous to the people involved and secondly—

MR. ENOKI: Excuse me, your Honor. Rather than [100] object everytime this comes up, I would object to this on the grounds it is irrelevant because it assumes a nuclear detonation.

THE COURT: You may reserve a motion to strike, counsel. I don't know whether it is irrelevant or not at this point. I will entertain a motion to strike. Lets proceed.

A Thank you. If people do not die in the fire storm, then it would depend on how long the nuclear explosion was, how large the fire storm was.

People who were subjected to intense radiation, gamma radiation; there would be, depending upon the population density near the explosion, there would be quite a lot of people, depending upon the population, who would develop acute radiation illness. Now, what is that.

That was first described when the Hiroshima and Nagasaki bombs were used. What happens is that high level radiation kills the actively dividing cells of the body. And within two weeks, the hair starts to fall out; the skin is affected; and large ulcers developed. And people develop vomiting and diarrhea as the blood cells die. And as the blood cells die, they develop bleeding and/or infection and die of either one of those. That is acute radiation illness.

Five years later, depending upon the population density again, there would be an epidemic of leukemia among the [101] people exposed. Leukemia increased 30 times after the Hiroshima bomb was exploded, five to ten years after the bomb dropped.

Fifteen years later, cancers would start appearing in various organs: stomach, bowel, breast, lung, thyroid, and many other organs.

It is now 33 years since those bombs were dropped and the incidence of cancer is still rising. In other words, medically we don't know the maximum time from initial radiation exposure to the peak incidence of cancer occurring. That should be thought about from a medical point of view.

Now, the second thing is if plutonium escapes. Apparently from my reading, plutonium in nuclear weapons is in the form of the metal plutonium. If there is a fire or if this plutonium is exposed to air, it spontaneously ignites, forming tiny air crystalized particles of plutonium less than one micron in diameter. One micron is one millionth of a centimeter. That is very, very small, of a cubic centimeter.

These particles, you can't see them. They are so tiny and they are readily inhaled by people and animals.

Plutonium is the most toxic element that we know. It is man made, appropriately named after Pluto, the god of Hell, I think. And it virtually didn't exist before we fissioned uranium.

It is so toxic because it is very mutagenic. Now, [102] what does that mean? It emits radiation. There are four sorts of radiation.

There are x-rays, so you can understand what I mean. X-rays only damage you instantly. They go through your

body. They can mutate or change the genes in the cells and they can cause cancer.

There are gamma rays which are like x-rays which are emitted from radioactive material.

There are alpha rays and betta rays.

Now, you all know an atom is made of rays. Here is an atom with a central nucleus with the electrons in orbit around it like that.

Now, alpha emitting material like Plutonium, emits a large particle composed of two protons and two neutrons from the unstable nucleus. It is so heavy that it only travels a distance of 40 microns which is a very short distance; in fact, the distance of a couple of cells in the body before it stops because it is so heavy; but because it is so large, it is extremely mutagenic. In other words, it changes genes very readily. Either the cell will die or will survive with a damaged gene.

Betta radiation is electrons being emitted, which is smaller and travels further and also causes cancer.

Now, how is cancer caused by this radiation? You all know that the body is composed of billions and trillions of [103] cells. Here is a typical cell. And inside the cell is a nucleus and in the nucleus are the chromosomes and there are 46 chromosomes in the cell. And arranged on the chromosomes are the genes. You have all read about genetic engineering lately. The scientists are playing around with the genes which are really building blocks of life, essence of life. They control who we are. Plants have genes. Animals have genes. They control the color of our hair, the color of our eyes, et cetera.

In every ordinary cell in the body, there is a gene that controls the rate of cell division, called the regulator gene.

Here is a particle of plutonium, for instance, sitting here next to a cell emitting continuously. If you look at it under the microscope, it looks like a star. And just by chance, the regulator genes hit. The gene is a molecule of deoxyribonucleic acid. It is a biochemical molecule. It just changes the chemistry of the molecule. The cell does not die.

The cell sits in a latent state for 15 to 50 years, that being the latent period of carcinogens, from the time when the cell is damaged and when the person develops cancer. Remember, it took 15 years for the survivors at Hiroshima to start manifesting cancer.

What happens is one active cell is dividing to produce [104] two daughter cells from the regulator way. The cell goes beserk and produces millions and billions and trillions of daughter cells in a totally unregulated way, and that is the cancer. In other words, it takes, in fact, one atom of plutonium, one cell, and one gene to kill a person.

Now, there is a lot of documents about the toxicity of plutonium, how much will cause cancer. It is generally accepted that one microgram, a millionth of a gram, is a carcinogenic dose.

But there is some controversy about this because there is a naturally occurring alpha emitter called polonium, which is a daughter of uranium and it is in the air. It has the same sort of energy emission as plutonium.

The tobacco leaves have little hairs on them and they tend to concentrate with polonium in the air. Smokers who smoke, when they breath the smoke into their lungs—here's the trachea, the main air passage—it divides in the lungs, in the chest and the lungs. This is the right lung and the left lung. As the air passages divide, there is a lot of turbulence and bifurcations of the air passage of the air. And the polonium tends to concentrate in the mucosa just here. And people have taken the polonium that they find in the lungs—

THE COURT: Just a moment. Counsel, couldn't we all agree that in the event of a disaster in this area, that the [105] medical consequences would be catastrophic and the results wouldn't be known, entire results, known for many years?

I appreciate what the doctor is saying here; but I think when we sum it all up, it is a situation that is almost—it is catastrophic.

MR. ZULKOWSKI: The point we are trying to make, your Honor, is in the candidate EIS, it mentions the re-

lease of plutonium in the air is going to be confined as a nuclear hazard. We have substantial medical evidence to indicate that that is not the case. If it does get in the air, as our earlier witness testified, Mr. Manly, it is going to be an extremely serious hazard.

THE COURT: This is cumulative, then, counsel. I would agree it would be an extreme health hazard. I think what the doctor is saying is what I have said, it would be catastrophic.

THE WITNESS: Catastrophic.

THE COURT: And the results—I am assuming a substantial explosion and I am also assuming you wouldn't have the medical results for many years. As you say about Hiroshima, they are still finding out about this and that and proving and disproving. Your scientists haven't come to a conclusion yet.

THE WITNESS: We have a lot of results. We have a lot of conclusions, but we are finding more.

[106] THE COURT: That's right.

THE WITNESS: Could I just explain what plutonium does in the body instead of continuing with this?

THE COURT: Very well. Let's proceed.

A Some people think in effect in nanogram quantities which is a thousandth of a microgram. That is what I was leading up to with this polonium study.

If plutonium is ingested in the G.I. tract, it was thought it wasn't absorbed, but a recent article in a science magazine says if water is chlorinated and most of our drinking water is, the oxidation state of plutonium changes and it becomes a thousand times more soluble. Therefore, a thousand times more readily absorbed. It is absorbed through the gut of babies in the first four weeks of life much more readily than it is in adults.

The way it usually gets in the body is by inhalation as I just explained. It is absorbed from the lung very slowly and it enters the body and it first of all concentrates in the lymph glands in the chest. Then it enters the blood and the

body thinks plutonium is iron. So it combines with the iron transporting protein of the blood.

In that state, it cannot be filtered through the kidneys because the molecule is too large, nor is it excreted through the body. Once it gets in the body, it is there forever until the person dies, virtually.

[107] It is stored in the liver where it causes liver cancer in animals. That is how we test drugs, by testing animals. It is stored in the bone where it causes bone cancer very readily. It crosses the placenta into the developing embryo where it is so incredibly radioactive it could kill a cell in the first three months of its life that is going to be responsible for the brain, part of the heart, et cetera. That is called teratogonesis. That is what the drug thalidomide did.

It also concentrates in the testicles, ovaries, being found in the fallout. Everyone in the northern hemisphere already has a small amount of plutonium in the testicles and ovaries from fallout. Here is the large testicle with the chevials formed like this. These are the cells that form the sperm here. The plutonium is found to be lodged just next to these cells where because of its incredible radioactivity could well damage the genes.

If a sperm with damaged genes formed the conceptus, the new baby, either the gene is damaged in the dormant way or the baby will be deformed or abort spontaneously or more likely, there will be a recessive gene and we all carry abnormal recessive genes that we hand on from generation to generation. We look okay, but it is not until you marry someone with this same abnormal recessive gene like diabetes, cystic fibrosis, et cetera that the gene will express itself.

[108] Plutonium is very mutagenic and actually locates in the reproductive organs and is very serious from a pediatric point of view. It is also very serious because babies and young children are 10 or 20 times more sensitive to the effects of radiation and, of course, plutonium than adults.

So therefore, from a medical point of view, this situation here in this island constitutes great medical problems and

in the health plan environmental section, they talk about accidental spill of nuclear material. They say the State's radiological incidence control plan calls for training of local health and safety personnel in handling of such disaster; but in reality, the agencies involved, Fire Department, Police Department, Civil Defense, hospitals, have no practical knowledge of proper techniques.

In fact, with plutonium inhalation, there is really nothing which one can do. The lungs are lavaged or washed out. There is an agent, EDTA, which removes a little of the plutonium, but not much. It tends to really stay in the lungs and it is almost impossible to remove most of it.

So this is a very, very severe medical problem, and plutonium is one of the most or probably the most toxic material that I have ever read about and it has a half life of 24,400 years which means that it is biologically dangerous and poisonous for half a million years. If it gets into the biological cycle, you can never treat it and get it back.

[109] If there was a fire with smoke, the smoke dissipates to nobody knows where. The particles, as I explained, are extremely small. You can never retrieve them. And also, it says in one of the environmental impact statements, it is very difficult to measure alpha rays, which is what plutonium is. It is difficult to measure them anyway.

THE COURT: Will you return to the witness stand, Doctor. Return to the witness stand, please. Proceed, counsel.

Q (By Mr. Zulkowski) Are you finished.

A Yes. Once it gets out—once it escapes in the environment, we can't retrieve it.

MR. ZULKOWSKI: Do you want to add anything?

MR. ENOKI: I thought we agreed—

MR. ZULKOWSKI: I have no problems. She can be back for cross-examination tomorrow. I thought if you had—

MR. ENOKI: I don't have any right now.

THE COURT: Is that satisfactory for you to return.

THE WITNESS: I think so.

THE COURT: You may stand down. Call your next witness, counsel.

MR. ZULKOWSKI: I would like to put in again a number of other exhibits. I am not clear whether or not the candidate environmental impact statement is in the record. No copy was given to Judge Wong, but I understand it to be with the proviso so that it would not be a part of the record.

AFFIDAVIT OF ROSALIE BERTELL

STATE OF HAWAII }
HONOLULU, HAWAII } ss:

ROSALIE BERTELL, being duly sworn in, deposes and says:

Since citizen participation in the decision to locate nuclear weapons at West Loch, Hawaii, is effectively curtailed by their inability to finance travel costs for expert witnesses, I would like to assist them insofar as I can through this affidavit. If I had been able to appear to testify in person, the following statements would have been the main concerns addressed.

There is an obvious conflict between the pursuit of the goals of the United States Navy and the recognition of the serious health hazard posed by the handling, transporting, storing (and accidental detonation of nuclear material.) To quote from the CANDIDATE ENVIRONMENTAL IMPACT STATEMENT, NUCLEAR ASPECTS OF NAVAL WEAPONS SYSTEMS STORAGE, of 28 Mar. 1979: "Storage sites ashore are a necessary, irreplaceable segment of the national defense capability." This mindset leads to such ridiculous statements as the one on page 4:

> In the event of a high explosive detonation, some plutonium material could be spread about the immediate area of the accident. This material will not cause radiological damage to personnel, regardless of one's proximity, if kept outside the body.

Since plutonium is an alpha emitter, this is a true statement on the surface; but there is no indication of the Navy's inability to retrieve this deadly material, no indication that the plutonium will eventually leave the immediate area of the accident and—by entering into the water system and becoming airborne on dust particles—enter into human bodies. It is in fact impossible to keep the plutonium "outside of the body" once it is in the air, water and food supply. Implying otherwise constitutes a cruel deception of the public with respect to a very potent carcinogen.

The next paragraph reads:

> Burning weapons, conventional or nuclear, may produce toxic or caustic gases. In addition, if plutonium is involved in fire, radioactive particles will accompany the toxic or caustic gases in the smoke cloud. However, such smoke clouds are limited to the accident scene, quickly dissipate, and may constitute an internal hazard to personnel at the scene. The smoke should be avoided.

This is comparable to "solving" a drowning man's problem by telling him not to inhale water! This is a completely unrealistic approach to a serious problem.

> Navy nuclear weapon units and facilities are fully equipped and trained to successfully contain and remove any hazards or potential hazards that might result from an accident with a nuclear weapon. These response teams are regularly exercised and evaluated on this capability.

Either this statement is a blatant lie, or there is some technical definition of "hazard" contrary to the usual meaning of the term! Radioactive material involved in a nuclear accident cannot be completely removed from the environment once it is released. If this were possible, then international concern for buildup of radioactive material in the environment raised by the United Nations Scientific Committee on the Effects of Ionizing Radiation in its 1977 report would not have been voiced. (1)

For the past year, a Department of Energy Task Force has functioned with a budget of one million dollars to find some way of removing the radioactive material which has contaminated the West Valley nuclear waste dump in New York State. (2) This material was derived almost exclusively from the nuclear weapon industry. Estimates of up to one billion dollars for the actual cleanup have been made. However, it is clear that the technology for the cleanup has never been tried, nor can it be promised that citizens can ever again be allowed access to this prime New York State dairy and agricultural land. The pollution there is from handling of radioactive materials, not from an accident situation.

The United States Navy, while it seems quite satisfied with its own efforts to protect health and safety, is now under investigation because of the increased incidence of leukemia among nuclear submarine workers. This increased risk was reported by Dr. Thomas Najarian at Boston Veterans' Hospital. (3) It was not discovered by the U.S. Navy, which has not even undertaken an adequate epidemiological study of its personnel to test predicted health effects against reality.

Two recent Congressional hearings (4, 5) have dealt with the under-estimation of the health effects of exposure to low-level radiation, and a Presidential order is now in effect to the Department of Health, Education, nd Welfare to investigate the handling of research into these effects. I am enclosing a copy of the Presidential order (Exhibit II) with this affidavit.

There are also two petitions pending beforre the U.S. Nuclear Regulatory Commission for an adjudicatory hearing to reduce the permissible levels of radiation exposure for workers in the nuclear industry. Two major epidemiological studies, the Hanford Study and the Tri-State Leukemia Survey, which measure actual health effects at low-level exposures, have challenged the industry and government predictions of "no harm" made previously by "educated guess." From my own research on the Tri-State Survey (Exhibits III and IV), I have no doubt that such optimistic forecasts were wrong. A copy of my petition to the N.R.C. (Exhibit V) is included with this affidavit.

The position of the U.S. Navy, namely, that low-level radiation poses no threat to the environment, to personnel, or to the people of Hawaii, (p. 5 of Naval Report) is untenable today.

Although for purposes of setting radiation safety standards only two health effects of exposure to ionizing radiation were considered, namely, death from cancer and severe genetic disease among the first-generation live-born offspring, the real world imposes its truth in totality. These are not the only health effects which occur. Radiation damages cells—either somatic cells or genetic material—and

causes changes in the DNA and RNA within the cells. This vital material governs the body's ability to adjust to its environment, to restore health after sickness, to prevent runaway cellular growth which can become cancerous, and to restore physiological balance under any stress conditions. Chronic exposure to ionizing radiation can be expected to undermine these body regulatory mechanisms in slow subtle ways, increasing the rates of cancer and birth defects, accelerating the aging process and causing the chronic diseases to appear at an earlier age. Since this radioactive material is undetectable by the human senses, since it enters into body chemistry and can be incorporated into tissue and bone, and since it is taken into the body through breathing, eating, drinking and bathing, there is no defense against it. All persons—whether children or adults, healthy or sickly —are at risk.

The location of a nuclear weapon base near Honolulu, a highly populated center and tourist attraction, poses inevitable long-term health effects for the residents. In addition to these, a serious accident could easily render the area uninhabitable, pollute the vegetation and aquatic life beyond rescue, and require displacement of the population as was mandatory (after much human suffering) at Bikini. (6) Even with no serious accident, the transportation, handling (and replacement) of nuclear materials can be expected to cause low-level exposures to the population via some penetrating gamma radiation and releases of radioactive materials into the air, land and water supply. The State of Hawaii does not seem to be prepared to carefully monitor subtle changes in the public health due to these exposures. For example, there is no evidence that a careful study of the age at onset of heart disease or diabetes in the population has been undertaken. The moving up of age-of-onset to younger years is a delicate indicator of the beginning of a deteriorating public health situation. Having an adequate and sophisticated health monitoring system would also provide the State with legal documentation of the health status of the population prior to the moving in of nuclear weapons, useful later if or when change was noted. Instead of such careful health monitoring, the population seems to be ex-

pected to accept the word of the Navy that no harm will be caused, and then subsequently to accept the Navy's later judgment, if or when harm is found, that it could not have been caused by the presence of the weapons! The people of Hawaii, like the uranium miners, the people of Grand Junction, Colorado, the military men who participated in the nuclear explosions, the people of Nevada and Utah, and many others now trying to obtain some redress in the U.S. Courts, will be helpless.

The immediate purpose of this affidavit is to alert the State of Hawaii to the rashness of entrusting questions pertaining to the health and safety of the people to the judgment of the U.S. Navy, which obviously has other more compelling commitments.

I would also like to raise the question of humans using weapons against their brothers and sisters which kill and maim for generation upon generation, and which destroy our life-support system, the fragile fabric of the earth. The God who made both the butterfly and the baby hardly wants them so cruelly and surely destroyed! Nuclear weapons will destroy those who make them, transport them, store them and use them, just as surely as they destroy those against whom they are used. The world is one ecosystem and pollution cannot be contained within national or state boundaries. Neither is there any way for humans to cease breathing, eating, drinking or bathing—all ways in which this nuclear material enters into the body.

Hawaii, one of the delightful natural habitats of the world, should not be allowed to become another nuclear disaster area. Reckless endangerment of the Islands, their people and their economic viability is too great a price to pay for some nebulous ill-conceived and unproved military security scheme.

Exhibits:

I Curriculum Vitae
II Memo from White House to DHEW
III "X-ray Exposure and Premature Aging"
IV "Measurable Health Effects of Diagnostic X-ray Exposure," Testimony before the Subcommittee on Health

and the Environment, U.S. House of Representatives, July 11, 1978

V Petition to the Nuclear Regulatory Commission

References:

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2. Western New York Nuclear Service Center Study Final Report for Public Comment: TID–28905–1 and Companion Report: TID–28905–2. U.S. Department of Energy. November 1978.

3. Mortality from Leukemia and Cancer in Shipyard Nuclear Workers by Thomas Najarian. The Lancet, May 13, 1978.

4. Proceedings of a Congressional Seminar on Low-Level Ionizing Radiation. A Report submitted by the Sub-Committee on Energy and the Environment of the Committee on Interior and Insular Affairs, U.S. House of Representatives. Nov. 1976. (79–767 0)

5. *Ibid.*, #4. February 10, 1978. In Press.

6. A Twenty-Year Review of Medical Findings in a Marshallese Population Accidentally Exposed to Radioactive Fallout by Robert A. Conard. Brookhaven National Laboratory, BNL 50424, September 1975.

/s/ _____
ROSALIE BERTELL, PH.D., G.N.S.H.
1/15/79

_____
Date

Subscribed and sworn to before me this 15 day of January, 1979.

/s/ _____
DAVID J. NARDOZZI
Notary Public, State of New York
Qualified in Niagara County
My Commission Expires March 30, 1979

SISTER ROSALIE BERTELL
CURRICULUM VITAE

Born April 4, 1929, Buffalo, New York

Member of a Roman Catholic Religious Community since September 1951

EDUCATION	*Degree*	*Date*	*Field*
D'Youville College, Buffalo	B.A.	1951	Mathematics
Catholic University of America, Washington	M.A.	1959	Mathematics
Catholic University of America, Washington	Ph.D.	1966	Mathematics

POSITIONS HELD

Energy/Public Health Specialist	Global Education Associates (UN Non-Governmental Orgzn)	8/78-present
Biostatistical and Radiation Health Consultant		6/78-present
Assistant Research Professor, Graduate School	State University of NY at Buffalo	1974–78
Senior Cancer Research Scientist	Roswell Park Memorial Inst, Bflo	1973–6/78
Associate Professor, Math Dept.	D'Youville College, Buffalo	1973
Cancer Research Scientist II	Roswell Park Memorial Institute	2/71–1973
Cancer Research Scientist I	Roswell Park Memorial Institute	6/70–1971
Visiting Professor	State University of NY at Buffalo	1972–1973
Coordinator of Inst. Research	D'Youville College	1/71–1972
Assistant Professor, Math Dept.	D'Youville College	1/69–1972
Coordinator, High School Math Teachers, Diocese of Atlanta	D'Youville Academy, Chamblee, Ga	1/68–1/69
Registrar	Sacred Heart Jr College, Yardley, Pa	9/58–1/68
Associate Professor, Math Dept.	Sacred Heart Jr College, Yardley, Pa	9/58–1/68
Graduate Assistant	Catholic University, Washington	9/57–1/58

MEMBERSHIPS AND COMMITTEES

American Academy of Political and Social Sciences
American Association of University Women
American Public Health Association
Consultant, New York State Medical Society, Committee on Environmental Quality
Consultant, Wisconsin State Medical Society, Committee on Health and the Environment
Energy Task Force, National Council of Churches
Institute of Society, Ethics and the Life Sciences
International League of Women for Peace and Freedom
Kappa Gamma Pi
Member, Environmental Health Committee, British Columbia Medical Association
National Assembly of Women Religious
New York Academy of Science
Sigma Xi
The Biometric Society

ACADEMIC AND PROFESSIONAL HONORS, SCHOLARSHIPS, TRAINEESHIPS

Scholarship (4 years at D'Youville), graduated Magna Cum Laude
Kappa Gamma Pi, Sigma Xi, Graduate Assistantship (Catholic University)
National Institute of Health Grant (3 years at Catholic University); Post Doctoral Summer Research

American Catholic Who's Who 1977, 1978
Community Leaders and Noteworthy Americans 1977
Dictionary of International Biography 1976–77, 1978–79
Grey Nuns' Legislative Chapter, Elected delegate, 1971, 1974, 1975
International Who's Who in Community Service 1978
International Who's Who of Intellectuals, Vol. II 1978
National Assembly of Women Religious: House of Delegates 1973 to present, National Executive Board 1977–80

Notable Americans 1976–77, 1978
Notable Americans of the Bicentennial Era 1976
Notary Public, Commonwealth of Pennsylvania 1966–70
Outstanding Civic Leader of America Award 1970

Outstanding Educators of America, elected 1973
Reader for Advance Placement Calculus Examination, Educational Testing, Princeton 1971, 1972
Sisters Assembly Executive Board: Buffalo, 1971–present
New York State, 1973–present
Who's Who in American Scientists 1973–77
Who's Who in American Women 1975, 1976, 1977, 1978, 1979–80
Who's Who in Health Care 1977
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PUBLICATIONS

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2. Introduction to Creative Mathematics, (Book) Edwards & Sons, 1971.
3. "Pets and Adult Leukemia," Am. Journal of Public Health, co-authored with Dr. Bross and Dr. Gibson, November 1972 (Vol. 62).
4. Contributed Paper: San Diego Biomedical Symposium, "Relative Risk and Other Population Parameters." January 1973.
5. Manual for Users, Relative Risk Program, theoretical design for and description of the computer program, 1973, with Chandu Rathod, Department of Biostatistics, Roswell Park Memorial Institute.
6. Relative Risks for Combinations of 2×2 Tables, a program for the Monroe 1860 Calculator, with L. E. Blumenson, 1973, Department of Biostatistics, R.P.M.I.
7. Relative Risks When there are Several Levels of Exposure, a program for the Monroe 1860 Calculator with L. E. Blumenson, April 1973, Department of Biostatistics, R.P.M.I.
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11. Theoretical Description of "Sister Test," Fastfortran (Conversational Ver. 4) Program, May 1974, with L. E. Blumenson, Department of Biostatistics, R.P.M.I.
12. "Nuclear Suicide," America, Vol. 131, No. 12, 1974.
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14. "Dubious Victory," Baltimore Sun, August 12, 1974.
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19. "The Equal Rights Amendment," W.N.Y. Catholic, feature article April 24, 1975.
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22. "Scientist questions some PP&L Claims," Letter to the Editor, Harrisburg Evening News, May 16, 1975.
23. Written testimony on the hazards of low level radiation. House of Representatives, Committee on Energy and the Environment, Subcommittee of the House Interior Committee. Rep. Morris Udall, Chairman, August 6, 1975.
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38. Testimony before the Nuclear Regulatory Commission in the matter of the application of Public Service Company of Oklahoma, et al. for Black Fox Nuclear Generators Units 1 and 2, Docket Numbers STN-50-556 and STN-50-557, Buffalo, NY, March 24, 1977.
39. Testimony before the Nuclear Regulatory Commission in the matter of Boston Edison Company et al., Pilgrim Nuclear Power Station Unit 2, Docket Number 50-471, Cambridge, Massachusetts, April 19, 1977.
40. Testimony before the Nuclear Regulatory Commission in the matter of the application of Public Service Company of Oklahoma, et al. for Black Fox Nuclear Generators Units 1 and 2, Docket Numbers STN-50-556 and STN-50-557, Tulsa, Oklahoma, August 24-25, 1977.
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43. Measurable Health Effects of Diagnostic X-ray Exposure. Testimony before the Subcommittee on Health and the Environment, U.S. House of Representatives, July 11, 1978.
44. The Ethical Problems Involved in Nuclear Generation of Electricity. An invited address delivered at the Energy Symposium, May 13, 1978, sponsored by the Irish Transport and General Workers Union in Dublin, Ireland.
45. Health Hazards Involved in the Production, Storage and Use of Nuclear Weapons. Invited address, Japan International Congress Against A- and H-Bombs. Osaka, Japan. August 1978.
46. Part 16 and Part 17, CBS-TV Summer Session: Alternative Futures (29 minutes each), June 1978. Video tapes available from Global Education Associates, 552 Park Avenue, East Orange, NJ 07017.
47. Testimony before the Energy Facility Siting Council of the State of Oregon, August 23-24, 1978.

48. Energy and Health. Article in The Social Costs of Energy Choices, a special issue of Christianity & Crisis, vol 38, no 15, October 15, 1978.

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50. Testimony Relative to Human Health and Nuclear Generation of Electricity. Discussion Texts, International Study Days for a Society Overcoming Domination, September 1978, d24.

AFFIDAVIT OF HOWARD B. MORLAND

STATE OF HAWAII

HONOLULU, HAWAII

HOWARD B. MORLAND, being duly sworn in, deposes and says:

On the basis of evidence presented by Catholic Action of Hawaii/Peace Education Project concerning the presence of nuclear weapons on Oahu, and on the basis of U.S. Navy documents describing the relocation of certain functions of the Navy's Lualualei Magazine from its Waikele Branch to its West Loch Brance, I am prepared to make the following statement:

> The nuclear weapon storage and maintenance facilities now under construction at West Loch, near Pearl Harbor, pose a serious threat to the health and safety of the people of Hawaii.

In support of this statement I will cite only the greatest of several hazards involved in the storage and, particularly, in the maintenance of nuclear weapons at West Loch. That hazard is the possibility of what the government calls "accidental or unauthorized detonation" of a nuclear weapon. In other words, a nuclear weapon at West Loch could explode with a fireball, a shock wave, a mushroom cloud, and deadly radioactive fallout. The consequences of such an incident would depend on the size of the explosion and on the direction of the wind, but it could easily be the greatest disaster in American history. Fallout would probably cause more casualties than blast and fire.

I. HOW LIKELY IS THE ACCIDENTAL OR UNAUTHORIZED DETONATION OF A NUCLEAR WEAPON AT WEST LOCH? Consider the following facts:

1. All nuclear weapons must undergo regular periodic field maintenance for inspection and replacement of batteries, rubber seals and gaskets, parachutes, and parts containing the radioactive isotope of hydrogen, tritium. This field maintenance involves partial disassembly and reassembly of the weapon.

2. The Special Weapons Division of the Waikele Branch of the Naval Lualualei Magazine has a technical mainte-

nance and repair officer and a weapons *assembly* officer. "Special weapons" is a euphemism for nuclear weapons. At West Loch, Building 440 contains a "MK 44 Shop" and a "MK 48 Shop". The Mark 44 is a nuclear warhead for the ASFOC missile, and the Mark 48 is a nuclear artillery projectile. It is reasonable to assume that field maintenance involving the disassembly and reassembly of nuclear weapons take place at Waikele and West Loch.

3. Nuclear weapon disassembly requires that any self-destruct mechanisms, intended to inhibit the unauthorized use of the weapon, be dismantled or bypassed. During field maintenance, a nuclear weapon is particularly vulnerable to accidental or unauthorized detonation because its fail-safe features are disabled and because the weapon is in the hands of people who know how it works and who have whatever special tools may be required to remove and replace parts.

4. Nuclear weapons have been deployed for years with known mechanical defects. On December 1, 1978, Department of Energy officials admitted that three quarters of A-1 model Polaris nuclear warheads deployed in the mid-1960s were defective and were probably duds. It took several years to correct the deficiencies, and more than a decade for knowledge of the deficiencies to become public. If nuclear weapons are mechanically defective in ways that make them easy to detonate accidentally, such information will certainly be kept from the public. While the *deliberate* unauthorized detonation of a nuclear weapon would entail a serious failure on the part of the military's "Human Reliability Program," the chance of *accidental* detonation during maintenance could be increased by mechanical defects in the weapons.

5. Finally, nuclear weapons on Oahu are a potential target for terrorists. The federal government is increasingly concerned about the possible theft or sabotage of nuclear weapons. There are probably dozens, perhaps hundreds, of people on Oahu who know how to gain entry to nuclear weapons storage and maintenance areas and who know how the weapons operate. Not all of them are on active military

duty. If one of these people is bribed, blackmailed, or kidnapped by an organization wishing to steal a weapon and set it off, the success of the mission will be enhanced by inside knowledge provided by the victimized person. If that person is part of the organization, the chance of success is enhanced still further.

II. WHAT WOULD BE THE CONSEQUENCES OF AN ACCIDENTAL OR UNAUTHORIZED NUCLEAR WEAPON DETONATION AT WEST LOCH? NUCLEAR WEAPON EFFECTS ARE NOT ENTIRELY PREDICTABLE, AND SOME OF THE KNOWN EFFECTS ARE CLASSIFIED INFORMATION. There is, however, enough public information available in Civil Defense publications and other government documents to make the following statements:

1. Contrary to the usual assumption, radioactive fallout from a nuclear weapon detonation at West Loch will *not* normally travel west with the prevailing surface trade winds. Upper level winds, not surface winds, determine the direction of fallout from a nuclear explosion. In Hawaii, prevailing upper level winds, above a twenty-thousand foot altitude, travel eastward from Pearl Harbor toward the city of Honolulu, opposite the direction of the surface trade winds. They then continue, forty percent of the time, directly toward the neighbor islands of Molokai, Lanai, Manui, Kahoolawe, and Hawaii. More than half the population of the state could die of radiation sickness following a nuclear weapon detonation at West Loch, if wind conditions are typical.

2. If the weapon is a "small" tactical weapon with an explosive yield of twenty kilotons, the size of the weapon used at Nagasaki, the region of lethal effects from blast and fire will be confined to the western parts of Pearl Harbor and Hickham Air Force Base. There will be few survivors inside a seven square-mile circle lying within one and one-half miles of the explosion. For the most part that area is sparcely populated, except on its eastern and southern perimeters where several thousand military men and their families live.

3. However, radioactive fallout from a twenty-kiloton explosion will cover an additional ten square miles within which few people will escape death from radiation sickness. This ten square mile area is likely to extend eastward from West Loch to Diamond Head, encompassing the rest of Hickham Air Force Base, the International Airport, and most of downtown Honoluiu, Kaimuki and Waialae-Kahala. Virtually everyone on Oahu southeast of the airport will suffer radiation sickness to some degree, assuming typical wind conditions. Well over a hundred thousand people will die, perhaps many more. Weeks will pass before the radioactivity has diminished sufficiently to allow removal of the bodies.

4. If the weapon is a 'large" tactical weapon with an explosive yield of one megaton, the zone of lethal blast and fire effects is more difficult to predict. Such a weapon has never been exploded in a populated area. Tests in the Marshall Islands in the 1950s indicate there will be few survivors within five-miles of West Loch. A five-mile radius from West Loch includes all of Pearl Harbor, Hickham, Aiea, Pearl City, Waipahu, Fwa, and Ewa Beach. Casualties from flash burns, fire, and broken glass will occur eight to ten miles from West Loch, as far away as Waikiki. Motorists will be temporarily blinded anywhere on southern Oahu. Many will wreck their vehicles, blocking roads and highways.

5. The mushroom cloud from a one megaton explosion an West Loch will be fourteen miles high and twenty miles wide, with its base ten miles above the ground. Viewed from a distance, it will have the appearance of a giant Frisbee, covering the island from Diamond Head to Nanakuli, and seemingly supported by a thin stem of smoke rising from Pearl Harbor. As the stem falls back to earth, the cloud will move toward Molokai and Maui. Inside its churning whiteness will be several thousand tons of pulverized soil and sand, along with sixty-five pounds of radioactive fission products—twenty-five times the corresponding amount for the "smaller" twenty-kiloton weapon. These sixty-five pounds of gaseous fission products, equivalent in radioactivity to two million tons of radium, will attach

themselves to the soil and sand in the cloud and fall back to the ground, assuring the death of anyone on southern Oahu who delays more than a half-hour in finding suitable fallout shelter. Most houses and apartments will be useless. It is hard to imagine that many people will survive in or near Honolulu or its southeastern suburbs.

6. Ironically, the fallout fatalities from a one-megaton explosion may *not* be many times greater than those from a smaller twenty-kiloton explosion. A small part of the fallout from the larger weapon will simply overkill the southern Oahu population, which is most of the state's population. Then, much of the deadly white ash will land in the ocean. The neighbor islands will have one or two hours' warning of the impending danger, if the upper level wind is blowing their way. The five thousand people on Molokai can possibly avoid death by crowding into several irrigation tunnels and staying there for two weeks—if they all get the word in time. On Lanai, two thousand people will need to share six hundred questionable fallout shelter spaces in tunnels and wells. Maui island may suffer heavy casualties, but most victims on Maui will recover from their symptoms within a few weeks even without shelter. However, a plague of thyroid cancers will appear among survivors. Any of the islands southeast of Oahu, including Hawaii, may be contaminated badly enough to require evacuation of all or part of the island, perhaps for a long time, but most of the fatal casualties will occur in or near Honolulu, or Oahu.

7. The State Civil Defence organization requires twenty-four hours to publish and distribute its tabloid newspaper telling people where to go and what to do about fallout. It might take a half-hour to get the emergency broadcast system on the air. An accidental detonation at West Loch will allow no such time for the Civil Defense apparatus to be activated. A completely uniformed civilian population will thus have no idea how to protect itself. Casualty estimates based on the optimistic assumption that much of the population will be sheltered are not valid in the case of a nuclear weapon detonation without warning.

8. Finally, one can imagine that the sudden destruction of America's fiftieth state with a nuclear weapon could be

the spark that sets off an accidental thermonuclear war between the USA and the USSR, especially if it occurs during a period of international tension, which is precisely the time it is most likely to occur.

In conclusion, the detonation of a nuclear weapon, large or small, at West Loch will be the greatest conceivable natural or man-made disaster that could befall Hawaii. No rational national defense goal requires the enormous risk of having nuclear weapons stored, inspected, or repaired, on the island of Oahu.

Name: Howard Morland

Birth: September 14, 1942; Birmingham, Alabama

Education:

1975 Dartmouth College (New Hampshire), Thayer School of Engineering; one year of post-graduate study

1974 Aeromarine Flight School (Honolulu, Hawaii): Airline Transport Pilot Certificate

1967 Reese AFB (Texas): USAF Pilot Training School, graduate

1967 Tinker AFB (Oklahoma): C-141 Pilot Transition Course, graduate

1965 Emory University: B.A. Economics

Employment:

Present Madison, Wisconsin: *The Progressive* magazine), 408 W. Gorham St.: writer on nuclear weapons

Past Honolulu, Hawaii: commercial air taxi pilot Leban, New Hampshire: flight instructor New York City, New York: *Flying* (magazine), 1 Park Avenue: writer

LIST of EXHIBITS

A1 West Loch aerial photo

A2 Acknowledged "Maintenance / Inspection shop" at West Loch

B Evidence of Nuclear Weapons at West Loch + Waikele

C1 Shipment regulations for "tritium reservairs" and other "limited life components"

C2 Location of tritium components in an H-bomb

D-1 through D6 Examples of combination locks on nuclear weapons which maintenance personnel must bypass to work on weapons

E Weapons with mechanical defects

F1 through F3 Psychological stability of persons with access to weapons

G1 through G5 Graphic display of effects of "unauthorized or accidental" detonation of nuclear weapons during maintenance, assuming typical wind conditions.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 78–0085

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, ET AL., PLAINTIFFS,

v.

HAROLD BROWN, ET AL., DEFENDANTS.

PREPARED TESTIMONY OF HOWARD MORLAND

Runway 8-Left at Honolulu International Airport, the principal instrument landing runway, should be closed to landing traffic whenever nuclear weapons are present at the West Loch Branch of the Lualualei Naval Magazine. The final approach course to runway 8-Left passes within one mile of the forty eight nuclear weapon storage bunkers at West Loch. The runway itself is two miles away.

Airplanes on landing approach to runway 8-Left are typically at an altitude of 700 feet when they pass abeam West Loch. The risk of radioactive contamination to a large area of Oahu in the event of an airplane crash at the nuclear weapon facility is an unacceptable risk for the people of the State. The two land uses—runway final approach course and nuclear weapon storage—are incompatible.

Furthermore, the airspace above the West Loch nuclear weapon handling areas should be formally designated a Prohibited Area. There is presently no federal airspace restriction associated with West Loch. Since the nuclear weapon facility lies *inside* the Honolulu Airport Traffic Area, and its location is not marked on air navigation charts, there is no reason for pilots to avoid directly overflying the facility.

The Pantext Plant near Amarillo, Texas, where all of America's nuclear weapons are assembled before delivery to the Department of Defense, is covered by an FAA-designated Prohibited Area. The West Loch facility, as a

nuclear weapon maintenance and assembly shop, should be similarly protected.

The personal experience on which I base these judgments is as follows:

a. As an airplane pilot I have made close to one thousand landings at Honolulu International Airport during the past twelve years, in both civilian and military airplanes. I have landed at Honolulu as a co-pilot acting as pilot in command of Air Force C-141 jet transports and as a civilian student pilot, instructor pilot and commercial air taxi pilot. As a result of flight training and flight examinations at Honolulu International Airport I have been issued an Airline Transport Pilot Certificate, as well as flight ratings for multi-engine airplanes and for instrument flight instruction. I am familiar with the patterns of air traffic at Honolulu and with the terrain surrounding the airport.

b. For the past six months I have conducted research on nuclear weapon production, at the invitation of the Department of Energy. As a free-lance writer on assignment for *The Progressive* magazine, I am writing a series of articles on nuclear weapon production. The first article of the series, on the subject of tritium, or radioactive hydrogen, is appended to this testimony.

I. On March 21, 1967, a fully armed Hawaii Air National Guard F-102 crashed on approach to Honolulu runway 8, which is now called runway 8-Left. The pilot bailed out exactly abeam-and one mile distant from-the present site of forty eight nuclear weapon storage bunkers at West Loch. With its engine dead and with no one at the flight controls, the airplane glided straight ahead one mile and crashed into Pearl Harbor channel, narrowly missing the residential area at Iroquois Point. A gust of wind, or a quirk of fate, could have turned the pilotless airplane north, toward West Loch. Traveling at close to two hundred miles per hour, and weighing 22,000 pounds, the disabled fighter plane loaded with rockets and guided missiles would have destroyed any building it hit.

The accident on March 21, 1967, is one of *Three* crashes of fully armed F-102 fighter aircraft at Honolulu in the past

twelve years. In all three cases, the airplanes were on approach to Honolulu International Airport when the pilots bailed out.

Short of an accidental or unauthorized detonation of a nuclear weapon, there can be no accident at a nuclear weapon storage and maintenance facility worse than an airplane crash. And yet, the new nuclear weapon facilities at West Loch are located beneath some of the world's most conjested airspace. Within five miles of West Loch are three airports: Barbers Point, Ford Island and Honolulu International.

Air traffic at Barbers Point Naval Air Station includes anti-submarine warfare patrol planes, fighter planes, and U.S. Army helicopters. Civilian flight training is the major activity at the Ford Island airfield. Traffic at Honolulu International Airport includes all military transport and fighter planes operating through Hickam Air Force Base (which has no runways of its own), both overseas and local commercial jets, inter-island air taxi and sightseeing aircraft, crop dusters, helicopters, and civilian flight school and rental aircraft.

Airplanes approaching Honolulu International Airport from the north and west routinely overfly airplanes in the Barbers Point and Ford Island traffic patterns. Honolulu International Airport normally conducts simultaneous landing operations on three intersecting runways, 8-Left, 4-Left, and 4-Right, requiring that airplanes destined for different runways fly intersecting courses with their flight paths separated only by altitude. Pilots approaching the airport and navigating the traffic patterns must therefore follow complex flight instructions many of which are unique to Honolulu and some of which are issued on the spot by tower controllers.

The midair collision in September of 1978, in San Diego, between a single engine airplane and a commercial jet, has given impetus to the search for a "reliever airport" on Oahu for small planes. Even if one is found, however, several factors will assure a varied mix of airplane types and a high volume of air traffic will persist at Honolulu International.

Oahu Island will continue to dominate the State's economy, and the limited land area on Oahu will continue to dictate crowded skies, especially in the vicinity of the State's major airport.

If the West Loch nuclear weapon maintenance and storage facility is actually utilized as a nuclear weapon base, the runway which brings air traffic within one mile of West Loch, runway 8-Left, should be closed to landing traffic.

II. In places where artillery firing, military air maneuvers, or other such hazards to flight exist, the FAA designates Restricted Aeas, prohibiting flight at certain altitudes and during certain times. There are thirteen Restricted Areas in the Hawaiian Islands, covering such places as Kahoolawe Island and Schofield Barracks.

In places where airplane flight constitutes an unacceptable hazard to people on the ground the FAA designates Prohibited Areas. There are only six Prohibited Areas in the entire United States. One covers the White House and the Capitol in Washington, D.C. Another covers the Rocky Mountain Arsenal in Denver, Colorado. A third covers the Pantex plant near Amarillo, Texas, where all of America's nuclear weapons are assembled by the Department of Energy before delivery to the Department of Defense.

As a nuclear weapon maintenance facility, West Loch is also an assembly point, since the weapons must be assembled following maintenance. If the Pantex Plant in Texas is covered by a Prohibited Area, the airspace over the West Loch facility should be similarly designated.

There are persently no restrictions against flight directly over the West Loch facility, other than those which normally apply to flight over populated terrain and within airport traffic areas.

III. An Air Installations Compatible Use Zones (AICUZ) study has been completed for the Barbers Point Naval Air Station. No such study has been done for Honolulu International Airport, but I have applied the principles used in the Barbers Point study to the Honolulu Airport.

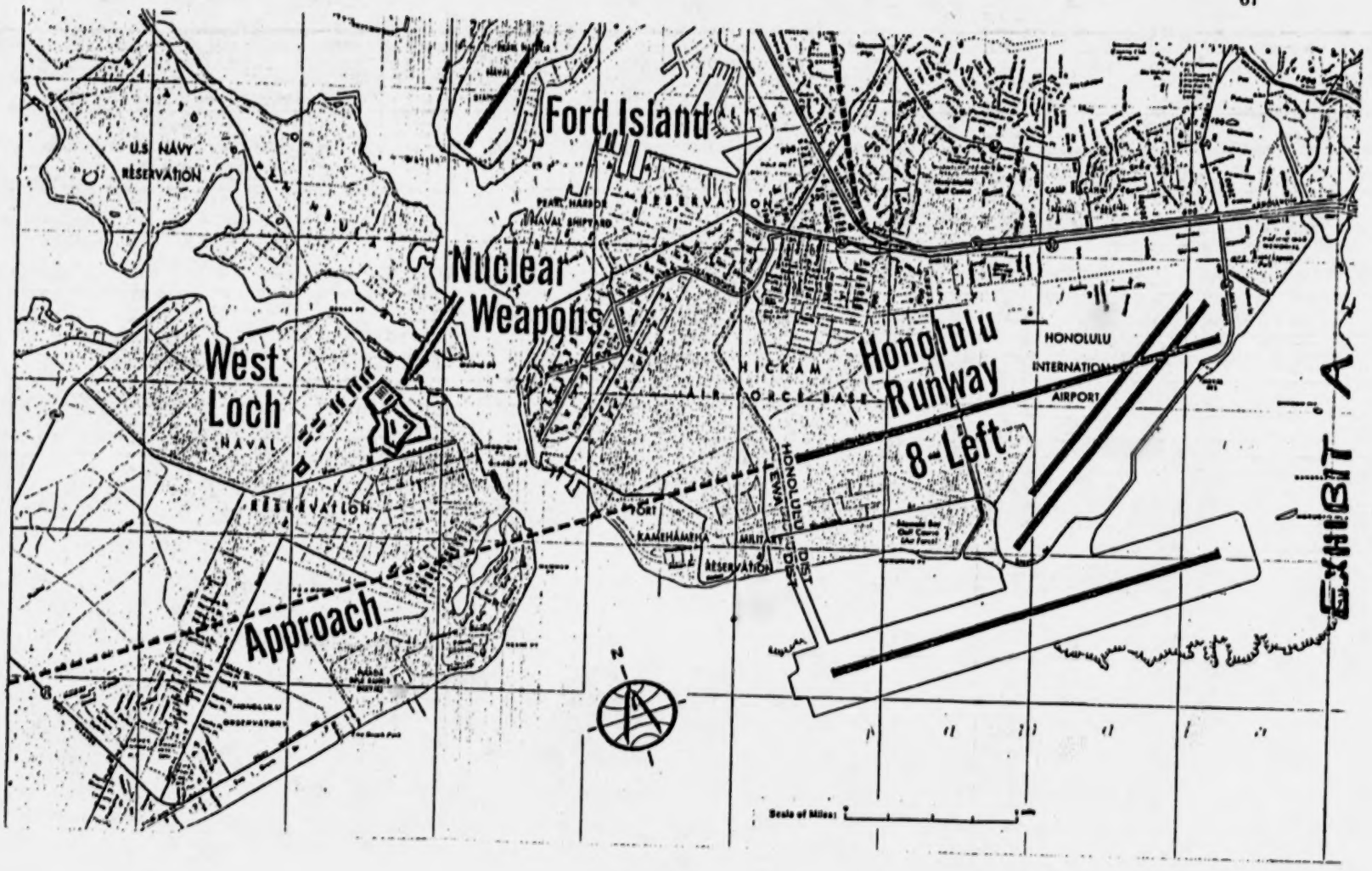
The accompanying maps and diagrams show that an AICUZ study of the Honolulu Airport would probably place the West Loch nuclear weapon facility *within* the Accident Potential Zone (APZ) for runway 8-Left.

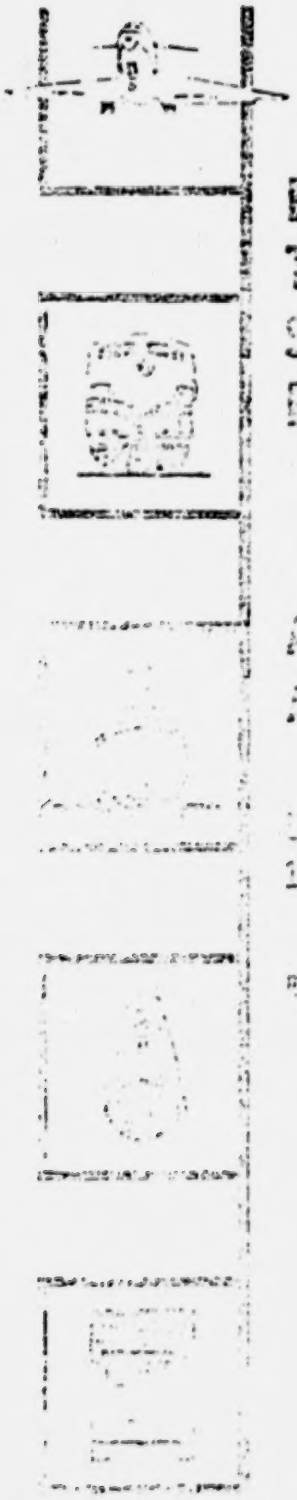
The Barbers Point study states, "The potential for accidents always exists in areas where aircraft are operating. National statistics indicate that this potential hazard increases in intensity the closer you are to runways." (page III–4) It is unlikely that a rational analysis would conclude that nuclear weapon storage and maintenance is a "compatible use" with airport approach zones.

LIST OF EXHIBITS

A	Honolulu runway map showing proximity of nuclear weapons to runway 8-Left final approach course.
B1–B6	Accident records for Air Guard crash on March 21, 1967
C1–C6	Accident records for Air Guard crash on November 15, 1969.
D1–D7	Accident records for Air Guard crash on June 9, 1973
E1–E2	Hawaiian Islands Sectional Aeronautical Chart, showing absense of airspace restrictions over West Loch
F1–F4	Prohibited Areas
G1–G9	Barbers Point Air Installations Compatible Use Zone (AICUZ) study. Note especially:
	G6 showing traffic for Honolulu *crossing* Barbers Point eastbound. A midair collision over Barbers Point could result in a crash at West Loch
	G7 showing Accident Potential Zones (APZ)
	G8 showing actual accidents at Barbers Point. Three accidents occurred *outside* Accident Potential Zones
H1	Honolulu Aerial view (artist's concept)
H2	Honolulu traffic patterns

H3	Honolulu Accident Potential Zones (hypothetical)
H4–H6	Congressional testimony about plutonium dispersal effects of destruction of one nuclear weapon bunker
H7–H8	Graphic illustration of such dispersal assuming trade wind and assuming Kona wind
I1–I5	Recent article on nuclear weapon production by author of this statement.


Ford Island
U.S. NAVY RESERVATION
Nuclear Weapons
West Loch NAVAL RESERVATION
Approach
HICKAM AIR FORCE BASE
Honolulu Runway 8-Left
HONOLULU INTERNATIONAL AIRPORT
KAMEHAMEHA MILITARY RESERVATION
HONOLULU DIST
EXHIBIT A



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ANNUAL REVIEW
AIRCRAFT ACCIDENT DATA

1978

REPORT NUMBER NTSB-

PLAINTIFF'S
EXHIBIT
78-0085
P-15

Best Copy Available

For total accidents, the percentage of pilot causes/factors decreased slightly from 36 percent to 34 percent. On the other hand, personnel and weather causes/factors showed the largest increases between the two time periods. For fatal accidents, the pilot, personnel, and weather cause/factor percentages increased the most from 1967 through 71 to 1972 through 76.

The distributions of accidents by phase of operation for the two periods are as follows:

First Phase of Operation 1/

1967 through 71 and 1972 through 76

Total Accidents

First Phase of Operation	1967-71 Frequency	1967-71 Percent of Total	1972-76 Frequency	1972-76 Percent of Total
Static	23	9.8	18	10.7
Taxi	15	6.4	17	10.1
Takeoff	15	6.4	14	8.3
In-flight	116	49.4	79	46.7
Landing	66	28.1	40	23.7
Unknown/not reported	0	0	1	0.6
Total accident records	235		169	

Fatal Accidents

First Phase of Operation	1967-71 Frequency	1967-71 Percent of Total	1972-76 Frequency	1972-76 Percent of Total
Static	4	11.1	1	4.0
Taxi	0	0	1	4.0
Takeoff	2	5.6	3	12.0
In-flight	16	44.4	7	28.0
Landing	14	38.9	12	48.0
Unknown/not reported	0	0	1	4.0
Total accidents records	36		25	

1/ See phase of operation in Appendix C.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO: 78–0085

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT ET AL., PLAINTIFFS,

v.

HAROLD BROWN, ET AL., DEFENDANTS.

AFFIDAVIT IN SUPPORT OF MOTION

State of Hawaii }
City & County of Honolulu } ss.

JAMES ALBERTINI, being duly sworn, deposes and says:

1. I am a plaintiff in the above-entitled action, and make this affidavit in support of the motion for a preliminary injunction filed herewith.

2. I have personal knowledge of the facts herein and, if called as a witness, I could testify thereto.

3. Since 1975, I have *regularly* fished in the waters off Waipio peninsula.

4. I am coordinator for plaintiff CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT.

5. I am very *concerned* about the *storage of nuclear weapons* at the proposed West Loch facility now under construction and fear for the safety of myself and other users of the Waipio peninsula.

6. The *Defendants have filed an environmental impact assessment* (attached as Exhibit A) for an ammunition storage facility at West Loch, Oahu, which they are presently constructing.

7. The cost of the facility will be over $12 million. (See attached Exhibit B).

8. The environmental *assessment concludes* that building of the facility will have *no significant effect on the environment and* will not be *environmentally controversial.* (Exhibit A, page 7).

9. The assessment admits that a significant fish pond that is listed on the National Register of Historic Places is within the present Naval Reservation at West Loch and within the *blast arc* for the facility. (Exhibit A, page 3, paragraph b and attachment B).

10. The assessment states that there are no significant species of plant or animal life on the project site, (Exhibit A, page 3, paragraph a) even though the Defendants supplemental impact statement for the Trident submarine base in Bangor, Washington, which considered West Loch as an alternate base, lists several endangered species as present on the site. (Exhibit C page 3–2–30).

11. The West Loch area is also the area that was designated to provide additional habitat to endangered bird species that were displaced by the construction of the Honolulu Airport's runway expansion. (Exhibit C, page 3–2–23).

12. The Defendants have ships and planes that carry nuclear weapons stationed at Pearl Harbor or on other bases on Oahu. (Attached Exhibit D).

13. All weapons for the Defendants ships and planes are stored at either the Lualualei storage facility, the Waikele facility or the West Loch facility. (See Exhibit E attached).

14. The Waikele facility is a "special weapons" facility. (See Exhibit E). That designation means nuclear weapons are present. (See Exhibit F).

15. The ordinance storage functions at Waikele will be moved to the proposed facility at West Loch. (See Exhibits G,A page 1, attached).

16. Despite the above, the Defendants will neither admit nor deny the presence of nuclear weapons' or their planned storage at the proposed West Loch storage facility. (Attached Exhibit II).

17. The Waikele facility was built in compliance with the Defendants regulations for a nuclear weapons storage facil-

ity. (See Exhibit I). The facility has the required double fencing, special lights and danger signs.

18. The Waikele facility also moves weapons to and from the West Loch docks in accordance with regulations for movement of nuclear weapons. (See Exhibit J).

19. The new storage facility being built at West Loch is designed to meet the regulations required for nuclear weapons storage facilities. (See Attachment D of Exhibit A showing the double fencing.) I have seen the construction blue prints for the proposed West Loch facility and, in addition to the double fencing, the prints show special lighting is to be included in constructing the facility.

20. To move the Waikele ordinance function to the West Loch facility will require movement either through or over residential areas of Oahu in the Waipahu—Ewa area.

21. Both the storage of nuclear weapons on Oahu at West Loch and their transportation within Hawaii have been very controversial issues in the State for many years. (See attached Exhibit K).

22. Resolutions have been introduced in the Hawaii State Legislature calling for controls and limitations on nuclear weapons storage and movement in Hawaii. (See attached Exhibit L).

23. Accidents involving ships, planes and helicopters handling nuclear weapons have been frequent in Hawaii. (See Exhibit M).

24. Should any radioactive leakage occur as a result of damage to a nuclear weapon, the wind patterns for the West Loch area would carry the radioactivity fallout over residential areas adjacent to the proposed facility. (See attached Exhibit N).

25. Flight patterns for Honolulu airport are directly over the project site and danger from plane crashs on the site exists. (See Exhibit O).

26. The present facility already has had safety regulations waived. (See Exhibit P).

27. The area surrounding the proposed project is slated

to be one of the fastest growing areas on Oahu. (See Exhibits A page 2 and Q).

/s/ _____
JAMES ALBERTINI

Sworn and subscribed before me this 16th day of March, 1978

/s/_____

Notary Public First Judicial
Circuit State of Hawaii

My commission expires: June 8, 1981

Department of Defense Directive

SUBJECT *Security Criteria and Standards for Protecting Nuclear Weapons*

Refs.: (a) DoD Directive 5210.41, subject as above, August 14, 1968 (hereby cancelled)

(b) through (n) (see enclosure 1)

I. *REISSUANCE AND PURPOSE*

This Directive reissues reference (a), establishes security policy, criteria and standards for protecting United States nuclear weapons, and extends the provisions of references (b) through (n) (enclosure 1). Reference (a) is hereby superseded and cancelled.

II. *APPLICABILITY AND SCOPE*

A. This Directive applies to all DoD Components (Office of the Secretary of Defense, the Military Departments, the Defense Agencies, the Organization of the Joint Chiefs of Staff, and the Unified and Specified Commands) having responsibility for the protection of United States nuclear weapons. Whenever there are differences between the minimum security criteria and standards set forth herein and those in other approved DoD directives, regulations, or instructions, the more stringent security criteria and standards shall apply.

B. The protection required for complete nuclear weapons shall be applied equally to nuclear warheads and nuclear components of a weapon except limited life components (LLCs). LLCs shall be protected commensurate with their security classification.

C. This Directive does not abrogate nor abridge the authority or responsibility of a commander to apply different, equal or more stringent criteria and standards during emergencies; however, this provision does not apply to the requirement for maintaining U.S. custody of U.S. nuclear weapons and components.

III. *DEFINITIONS*

Terms used in this Directive are defined in enclosure 2.

IV. *POLICY*

A. Nuclear weapons require special protection because of their political and military importance, their destructive power, their cost and the consequences of an unauthorized or accidental nuclear or high explosive detonation. Nuclear weapons must not be subjected to adverse environments except when such exposure is dictated by operational requirements. The conservation of nuclear weapons as a national resource, the safety of the public, operating personnel and property and protecting weapons from damage, disruption or diversion are of paramount importance during all phases of operations.

B. The protection afforded nuclear weapons must counter-balance the inherent risks and threats associated therewith. In providing essential protection, accurate assessment must be made of all relevant factors, such as: (1) the location of the weapons; (2) the configuration in which they are maintained; (3) the nature and capabilities of potentially hostile forces; and (4) the reliability and capabilities of personnel responsible for the protection of nuclear weapons. *Physical security measures, such as barriers, clear zones, lights, and intrusion detection alarm systems must constitute a balanced, in depth system which complements and supplements the protective forces.*

C. Current and possible future threats, national policy, and the resulting need for effective operational flexibility and minimum reaction time often require weapon systems to be on alert and nuclear weapons to be stored in the vicinity of their delivery systems. Outside of the United States, nuclear weapons are generally more vulnerable than those located in the United States. Thus the security criteria and standards applied to nuclear weapons in Class I land areas shall be more stringent than those applied in Class II land areas.

D. Commanders shall review on a recurring basis protection afforded nuclear weapons under their cognizance in conjunction with current intelligence and all other relevant factors. Security programs shall be revised as necessary to assure adequate protection to weapons at all times. When-

ever a threat analysis leads to a doubt that reasonable protection can be provided for nuclear weapons from available resources, the Assistant to the Secretary of Defense (Atomic Energy) (ATSD(AE)) and the National Military Command Center (NMCC) shall be immediately notified by the most expeditious means.

DEFINITIONS

A. Definitions in the "Glossary of Nuclear Weapons Materials and Related Terms" (Technical Manual) AEC-DNA TP 4-1/TM 39-4-1/SWOP 4-1/T.O. 11N-4-1, October, 1969 (reference (m)), and publications which amend, supplement or supersede it apply.

B. For the purpose of this Directive the following definitions shall apply:

1. *Technical Knowledge*: That knowledge, however, obtained, which would allow an individual to tamper with a nuclear weapon in such a manner that such tampering would not be detected during normal prefire operations or weapons monitoring inspections and could cause, then or later, unauthorized prearming, arming, launching, firing, releasing, or detonation of a nuclear weapon or degradation of weapon performance at the target.

2. *Access*: Close physical proximity to a nuclear weapon in such a manner as to allow the opportunity to tamper with or damage a nuclear weapon. Normally, a person would not be considered to have access if an escort or a guard were provided for either the person, or the weapon when the person is in the close proximity of it.

3. *Critical Position*: A position, the incumbent of which, by the nature of his authorized duties:

a. Has access and technical knowledge as defined above; or

b. Can, at battalion/squadron/ship level or below, either directly or indirectly cause the launch or employment of a nuclear weapon; or

c. Controls or uses sealed authenticators, codes, strategic missile computer tapes, emergency action messages, or release procedures for nuclear weapons.

4. *Controlled Position*: A position, the incumbent of which, by the nature of his authorized duties:

a. Has access but no technical knowledge as defined above; or

b. Controls entry into an Exclusion Area, but does not have access or technical knowledge as defined above.

5. *Exclusion Area*: *Any designated area in which one or more nuclear weapons are located.*

6. *Limited Area*: *A designated area surrounding one or more Exclusion Areas.*

7. *Security Force (SF)*: Those persons whose primary duties are to protect nuclear weapons.

8. *Security Alert Team (SAT)*: Two or more security force members, in addition to those on established guard posts, capable of immediate response to any irregularity as a reinforcing element.

9. *Backup Alert Force (BAF)*: Three or more security force members in addition to those on established guard posts and the SAT, designated to reinforce the SAT.

10. *Reserve Force (RF)*: Ten or more designated and trained personnel for response in support of on-duty security force personnel.

11. *Augmentation Reserve Force (ARF)*: Additional military personnel (or units) other than those assigned to a specific security or reserve force, trained and capable of augmenting a security and reserve force as required.

12. *Classes I and II Land Areas*: Land areas on which nuclear weapons are located are categorized as:

a. Class I—Areas other than the Continental United States, Alaska and Hawaii.

b. Class II—The Continental United States, Alaska and Hawaii.

13. *Other Emergency Forces*: Designated personnel constitute the firefighting force, Explosive Ordnance Disposal (EOD) teams; nuclear accident/incident teams, medical emergency personnel, etc.

14. *Waiver*: A temporary deviation from the physical security provisions of this directive.

15. *Exception*: A permanent deviation from the physical security provisions of this directive.

16. *Duress System*: A method by which security force personnel who control entry into, vouch for or escort visitors into a Limited and/or Exclusion Area, can covertly communicate a situation of duress to other operating or security personnel.

CRITERIA AND STANDARDS FOR PROTECTING NUCLEAR WEAPONS

A. *General*. The criteria and standards provided herein are an extension of the provisions of references (b) through (j) (enclosure 1).

1. In planning the security system for nuclear weapons, priority of efforts and resources shall be given to the protection of nuclear weapons themselves. Such security shall be in depth, commensurate with the threat to, or vulnerability of the weapons, space limitations, and environmental factors.

2. All Exclusion and Limited Areas shall be designated and conspicuously posted as restricted areas under the provisions of Section 21, Internal Security Act of 1950 (50 U.S.C. 797) (reference (j)).

3. All nuclear-capable certified units shall comply with the appropriate provisions of this directive, even if war reserve weapons are not possessed.

B. *Selection and Use of Personnel*. Personnel associated with and directly influencing the security of nuclear weapons can be classified as command and supervisory, operational, security, support and maintenance personnel. Other established policies and directives, such as DoD Directives 5210.8 and 5210.42 (references (d) and (k)), primarily prescribe the security clearance and selection criteria for these people.

1. Enclosure 4 lists the typical requirements by type duty position of personnel who are assigned in critical and controlled positions. Because of the diversity of position titles and duties between the Services, the definitions in paragraphs B.3. and B.4., enclosure 2, are the governing factors as to whether an individual is assigned to a critical or controlled position within a specific unit.

2. All positions herein categorized as critical or controlled positions shall be formally so designated.

3. A Background Investigation to be utilized in screnning personnel for duty in critical positions, is required prior to such assignment.

4. Prior to performing nuclear duties, each individual assigned to a critical position shall be qualified and certified as proficient by a qualified person designated in writing for the purpose. All individuals scheduled for assignment to critical positions listed in paragraphs 5.a. and 9., enclosure 4, shall be qualified by formal course of instruction and

7. When warranted by emergency conditions, the primary efforts of SF, RF and ARF shall be directed to protecting areas in which nuclear weapons are located, to assure that authorized emergency evacuation or destruction can be accomplished.

8. Plans shall be maintained to withstand or repel concentrated penetration and seizure efforts by militant, terrorist or other criminal element. Under no circumstances will an unauthorized penetrating force be permitted to remove any material from an Exclusion Area. Every means available shall be used to preclude such an occurrence.

a. All possible actions shall be taken, including the *use of deadly force*, to preclude unauthorized access to, or seizure of, any nuclear weapons storage area, transporting vehicle with weapons aboard, or nuclear weapons.

b. All necessary actions, including the use of deadly force, shall be taken to ensure immediate reoccupation and/or securing of any Exclusion Area which may have been penetrated.

c. Should hostages be used as a means of entering or occupying an Exclusion Area, or as cover for the removal of nuclear weapons from such an area, the welfare and safety of the hostages shall not be considered as a deterrent in actions to stop the penetrating force.

d. Correct interpretation of the intent and temper of suspect elements is an essential element of an adequate security posture. Supporting security forces shall be provided detailed guidance and training in recognizing the difference between forceful or determined hostile penetration, and the assembly of demonstrators, inadvertent trespassing or comparable encroachments.

e. Whenever possible, there shall be a defined action which must occur, or an attempted breach of a specific safe-

guard or boundary, as a precondition to the application of deadly force.

f. Appropriate precautionary actions shall be taken when warranted by such things as weather conditions or low visibility.

D. *Intelligence*

1. Under the guidance of the Joint Chiefs of Staff, the Defense Intelligence Agency (DIA), the Services and the Unified and Specified Commands shall provide commanders or organizations responsible for safety and security of nuclear weapons with current intelligence concerning threats to nuclear weapons. As a minimum:

a. The Services, consistent with the policies of DoD Directive informed concerning (a) requirements for counterintelligence evaluated information and support related to the security of nuclear weapons, and (b) local incidents posing a threat to the security of nuclear weapons.

3. Subject to annual validation, commanders responsible for the safety and security of nuclear weapons may retain threat information as long as it is current, valid, and relevant to the security of nuclear weapons under their responsibility.

E. *Two-Man Concept*

1. During any operation which may afford access, there shall be present a minimum of two authorized persons, each capable of detecting incorrect or unauthorized procedures with respect to the task to be performed, and familiar with applicable safety and security requirements. Two authorized persons shall be considered to be present when they are in a physical position from which they can positively detect incorrect or unauthorized procedures with respect to the task or operation being performed.

2. When application of the two-man concept is required, it shall be enforced constantly by the persons who constitute the team, while they are accomplishing the task or operation assigned and until they leave the area within which it is required.

3. The security force shall assure that no lone individual is permitted in a Limited or Exclusion Area unless controlled by: (a) the use of intrusion detection alarm systems which meet the requirements of J., below; (b) security force personnel; or, (c) a combination thereof. No lone individual is to have access to a nuclear weapon.

4. The only exceptions to this concept shall be those specifically set forth in approved nuclear weapons systems safety rules established in accordance with the provisions of DoD Directive 5030.15 (reference (h)).

F. *Entry and Access Control*

1. Entry control to Limited and Exclusion Areas shall assure positive identification of all personnel prior to admission. As a minimum, the following shall be instituted: (a) a controlled picture badge system; (b) formal entry control rosters; (c) a visitor escort system; and (d) a duress system. In Limited and Exclusion Areas where a badge exchange system is in effect, and the badge contains a photograph and sufficient information to assure positive identification of the bearer, it shall suffice as a formal entry control roster.

2. *Entry into Limited or Exclusion Areas shall be restricted to authorized personnel.* Persons shall be authorized entry only for performance of assigned tasks and the number so authorized shall be kept to a minimum. All personnal authorized entry into such areas shall have an appropriate personnel security clearance. Personnel authorized entry without a security clearance shall be kept under constant surveillance by a designated escort. Movements of service or construction personnel in Limited and Exclusion Areas shall be restricted to those necessary for the performance of assigned tasks.

3. Emergency access provisions are set forth in C.3.d., above.

G. *Physical Barriers*

1. Nuclear weapons shall be stored within an Exclusion Area. Removal from an Exclusion Area is authorized only when required for operational reason or when in transit in accordance with N., below.

2. Physical barriers shall clearly delineate the zone of protection associated with Limited and/or Exclusion Areas and provide positive means of denying or impeding entry. These barriers may be walls or fences on land, or decks and bulkheads aboard ship. Where permanent physical barriers are considered impractical, because of the temporary nature of the Limited and Exclusion Areas or for other reasons, such as the space limitations aboard a submarine or aircraft, their absence shall be compensated for by temporary physical barriers, additional guards or patrols, controls, or other security measures. At facilities where nuclear weapons are located on land, the following minimum requirements shall be met in:

a. Class I land areas, *two barriers*.

b. Class II land areas, one barrier, except where weapons are located at remote sites and protected by relatively small organizations without colocated supporting military forces (such as SAC Satellite Bases and ADC dispersed operating bases and other sites not colocated with other forces). Service Storage Facilities (SSFs) and *Operational Storage Sites* (OSSs) shall be provided with *two barriers*.

3. Where more than one permanent physical barrier is required, the barriers shall be separated not less than 15 feet nor more than 150 feet.

4. Numbers of entry control gates or doors (pedestrian and vehicle) shall be kept to a minimum. When closed, they shall provide a barrier structurally comparable to their associated barrier(s) and so designed that the traffic through them shall be under the positive control of the security force. Unguarded entrances to Exclusion Areas shall be locked and under human, electrical or mechanical surveillance.

5. Permanent physical barriers should be located, with due consideration to required *clear zones*, terrain features, property lines, and building layouts, not less than 30 feet and normally not more than 150 feet from buildings or objects being protected. Ideally, nuclear weapons storage and

assembly buildings should be located 50 feet from the inner perimeter fence.

H. *Clear Zones*

1. To the maximum extent feasible, clear zones shall be free of all obstructions, topographical features, and vegetation which may offer concealment of intruders or reduce the effectiveness of the physical barrier.

2. Clear zones shall be maintained around permanent physical barriers located in Classes I and II land areas. As a minimum, they shall extend 30 feet on both sides of the physical barriers, including all areas between barriers when more than one barrier is utilized. Whenever this is not practical, such as when serious erosion problems would result, or local laws prohibit clearing, compensating security measures shall be employed.

I. *Lights*

1. Security lighting shall be provided for permanent, Limited and Exclusion Areas in Classes I and II land areas in such a manner as to discourage, and facilitate the detection of, attempts of unauthorized approach to, and entry into, such areas. Such lighting shall be under the control of the security force. Where such lighting installation is impractical, such as immediately adjacent to runways, its absence shall be compensated for by additional guard posts, patrols, controls, or other security measures.

2. Lighting shall be positioned within the protected area, on, above, or near permanent physical barriers, entry control gates, and areas or structures where weapons are located in such a manner as to provide adequate illumination for personnel identification, entry doors to storage structures and areas immediately surrounding weapons located in the open.

3. A protected alternative source of power shall be provided for all security lighting, and procedures shall be established to assure prompt availability of power from an alternate source. Alternate sources of emergency power shall incorporate automatic start features unless they have continuous power available as a design feature.

4. Where feasible, perimeter and access control point lighting shall be positioned advantageously to security forces, so as to prevent glare from blinding sentries and to avoid silhouetting or highlighting sentries from outside the restricted areas.

J. *Intrusion Detection Alarm (IDA) Systems*

1. The basic purpose of such systems shall be to provide useful and practical assistance to a security force. As a minimum, intrusion detection alarm systems shall be used on all nuclear weapon storage structures in permanent sites located in Classes I and II land areas. To the extent feasible, intrusion detection systems should be installed as a part of storage and weapon alert area barrier systems. Compensating security control measures and security forces shall be employed at temporary weapon storage areas, structures or spaces and permanent storage areas without IDA systems, or with IDA systems which do not meet the minimum requirements of 2., below.

2. Such systems shall be dependable, easy to maintain in their operational environment, adequately protected against tampering, and fail-safe (i.e., alarm in case of failure); have low nuisance alarm rates; be equipped with a protected prompt alternate source of power, or an emergency battery power source. They shall provide both audible and visual alarm indications.

3. IDA systems shall be tested and inspected daily to assure proper functioning. Record data shall be maintained relative to alarms, false alarms, tests, malfunctions, and servicing/maintenance to allow for continuous evaluation of installed systems.

K. *Security Forces Communication System*

1. At least two systems of communication shall be provided: (a) from storage/alert areas proper to the exterior controlling or reinforcing military unit, and (b) within the storage area linking all important fixed guard facilities. One of these systems shall be radio, provided with an independent emergency power source.

2. A system of radio communication shall be provided between patrols and fixed security force locations. Fixed stations shall be provided with an emergency power source.

3. When in transit, a system of communications shall be provided to facilitate frequent periodic checks with designated communications or control activities.

L. *Security Features of Weapon Storage Structures.* The physical security features of permanent weapon storage structures in Classes I and II land areas shall be as specified in the Nuclear Weapons Storage Facilities Manual (reference (i)).

In the Supreme Court of the United States

NO. 80-1377

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

CATHOLIC ACTION OF HAWAII/PEACH EDUCATION PROJECT, ET AL.

ORDER ALLOWING CERTIORARI. Filed April 6, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

80-1377

Office-Supreme Court, U.S.
FILED
MAR 19 1981
ALEXANDER L. STEVAS,
CLERK

In the

Supreme Court of the United States

October Term, 1980

No. .....

CASPAR W. WEINBERGER,
Secretary of Defense, et al.,
Petitioners,

—v.—

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, particularly in light of Department of Defense (DOD) regulations mandating compliance with the requirements of the National Environmental Policy Act (NEPA) even where information involved may be classified, the United States Court of Appeals was correct in ruling that the Navy must comply with NEPA and prepare an Environmental Impact Statement (EIS) in connection with its plan to store nuclear weapons in close proximity to the Honolulu International Airport and two military airports.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

ADDITIONAL REGULATIONS INVOLVED

Department of Defense Regulation

32 C.F.R. §214.8(i):

> The fact that a proposed action is of a classified nature does not relieve the proponent of the action from complying with the requirement of this Part. Environmental statements, both draft and final, shall be prepared, safeguarded, and disseminated in accordance with the requirements applicable to classified information, DOD Regulation 5200.1-R, Information Security Program Regulation, July 15, 1972, 32 FT 159. When feasible, these statements shall be organized in such a manner that classified portions can be included as annexes, so that the unclassified portions can be made available to the public.

Council on Environmental Quality

Regulation

40 C.F.R. §1507.3(c):

> Agency procedures may include specific criteria for providing limited exceptions to the provisions of these regulations for classified proposals. They are proposed actions which are specifically authorized under criteria established by an Executive Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order or statute. Environmental assessments and environmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable

to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.

STATEMENT OF THE CASE

This case concerns the question of whether the Navy must prepare an EIS in connection with its plan to store nuclear weapons one mile from a major flight path to the Honolulu International Airport and adjacent to two smaller military airports.

In 1975, the Navy prepared an Environmental Impact Assessment (EIA) in connection with its plan to transfer weapons then stored at the Waikele branch of the Lualualei Naval Magazine on the Island of Oahu, Hawaii,[1/] to the West Loch branch of the Naval Magazine, adjacent to the three airports.

Noting that weapons had been stored at West Loch since 1959, the EIA concluded

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1/ Substantial evidence in the record, including but not limited to photographs of weapons, indicates that nuclear weapons were being stored at Waikele, P-47-51 (plaintiffs' exhibits at trial); Affidavit of James Albertini, dated March 16, 1978.

that increasing the number of weapons would have no significant impact on the environment, and thus an EIS was not necessary. The EIA did not, however, take into consideration that the existing weapons were conventional, and that the new weapons would include nuclear weapons.

In 1978, the Navy prepared a short Candidate Environmental Impact Statement (CEIS) concerning the general effects of storing nuclear weapons. Although the CEIS mentioned that nuclear "warheads will remain intact when dropped from heights much greater than those normally experienced in actual handling operations,"[2/] it did not consider the potential implication of storing nuclear weapons in close proximity to airports, or what might occur if a plane crashed into a storage bunker

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2/ Petition for Certiorari, hereinafter Petition, p. 32a.

containing one or more nuclear weapons. Although the Navy has consistently taken the position that it can neither confirm nor deny the presence of nuclear weapons at West Loch (or anywhere else for that matter), in the course of this litigation, petitioners have stipulated that the new bunkers constructed at West Loch are capable of storing nuclear weapons. As the court below stated: "the public therefore must assume that at least the possibility exists that nuclear weapons . . . will be stored at West Loch." Petition, p. 5a. Nonetheless, petitioners have failed to examine the following questions which the court below considered essential to any decision to store nuclear weapons at West Loch:

(1) the risk of nuclear accidents;

(2) the enhancement of that risk by the physical proximity of the airports;

(3) the effects of any nuclear accident upon the surrounding population and environment of Hawaii; and

(4) the effects of continual low-level radiation from the storage of the weapons near populated areas.

Petition, pp. 3a and 5a.

REASONS THE WRIT SHOULD NOT BE GRANTED

1. The Decision Of The Court Below Does Not Constitute Any Departure From Existing Principles Of NEPA Law And Thus Does Not Warrant Review By This Court.

In light of several significant concessions by petitioners, respondents are somewhat puzzled about why the Petition for a Writ of Certiorari has been filed in this case. Petitioners have conceded that their own regulations mandate compliance with NEPA. Those regulations state as follows:

> The fact that a proposed action is of a classified nature does not relieve the proponent of the action from complying with the requirements of this Part. Environmental statements, both draft and final, shall be prepared, safeguarded, and disseminated in accordance with the requirements applicable to classified information, DOD Regulation 5200.1-R, Information Security Program Regulation, July 15, 1972, 32 FR 159. When feasible, these statements shall be organized in such a manner that classified portions can be included as annexes, so

> that the unclassified portions can be made available to the public.

32 C.F.R. §214.8(i) (emphasis supplied); accord 40 C.F.R. §1507.3(c), quoted at Petition, p. 10. Petitioners further concede:

> This regulation applies even to highly classified actions such as the maintenance and storage of nuclear warheads.

Petition, p. 9. Finally, petitioners concede:

> NEPA's overriding mandate that decision makers inform themselves of the environmental consequences of their proposed actions and take those considerations into account can best be served by the filing, where appropriate, of a "real" EIS directed to the Navy's true plans, even if much or all of the statement, is withheld from the public.

Petition, p. 18.

Despite the fact that the decision makers have not informed themselves concerning the greatest and most obvious dangers of storing nuclear weapons at West

Loch, petitioners nonetheless seek to upset the ruling of the Ninth Circuit, which requires them to prepare an EIS, on what amounts to two main contentions: (1) that much of the information that would be contained in the EIS is classified; and (2) that disclosure of this non-classified information would inevitably lead to the revelation of the classified information as well. Petitioners seek to bolster this argument by reciting at length numerous sections of the Atomic Energy Act and DOD regulations concerning classified data. Petition, pp. 1-5, 36a-59a. That recitation, however, does not justify disturbing (and therefore does not justify reviewing) the decision of the court below. For as noted above, DOD regulations themselves make it clear that NEPA must be complied with even where some or even all relevant facts are classified. 32 C.F.R. §214.8(i).

The United States Court of Appeals, in Concerned About Trident v. Rumsfeld, 555 F.2d 817, 823 (D.C.Cir. 1977), squarely rejected the Navy's argument that military actions are exempt from NEPA "under the overused rubric of 'national defense.'" Having failed to exempt themselves from NEPA under one "overused rubric," it appears that the Navy has merely switched to another -- that of "classified information" and "restricted data." The acceptance of petitioners' new rubric and arguments would, however, mean nothing less than the scrapping of their own and the Council on Environmental Quality's (CEQ) regulations. It would, in effect, mean that if some of the material to be included in the EIS were classified, then no EIS would be legally required -- a result which NEPA and the DOD and CEQ regulations was plainly intended to prevent.

Petitioners try to avoid the plain words of their own regulations by claiming that what is at issue here is not whether NEPA (and their own regulations) must be complied with, but "whether the provisions of NEPA relating to the public development, disclosure and dissemination of environmental impact statements invariably must be complied with, even where such compliance is likely to reveal military secrets." Petition, p. 10 (emphasis in original). That, however, is not the question before this Court. For the Ninth Circuit, in its opinion, did not direct, or even address itself to, which portions of the EIS must be made public; it merely ordered the Navy to prepare an EIS -- to consider the dangers, that apparently have never been considered, that might arise from storing nuclear weapons at West Loch.

Once petitioners have prepared the EIS in compliance with NEPA, there may be some dispute between petitioners and respondents and other interested parties concerning whether particular information in the EIS was properly classified. The question of what specific information can and should be available to the public may, therefore, reach the federal courts at some time in the future. Contrary to petitioners' assertions, however, it is not before this Court now. Rather, the question raised by this case is whether petitioners must prepare any EIS in conjunction with the plan to store nuclear weapons at West Loch.

Clearly, petitioners' own regulations answer that question in the affirmative and, therefore, review of the decision of

the court below is both unnecessary and inappropriate.[3/]

II. Considerable Unclassified Information Exists Which Can And Must Be Addressed In Public Portions Of An EIS.

By their lengthy recitation of requirements regarding classified information, petitioners attempt to obscure two facts: first, that several of the questions that must be addressed in the EIS herein turn, at least in part, on unclassified information and, second, that because ours is basically an open society,

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3/ The fact that the court below spoke in terms of a "hypothetical" EIS does not indicate any departure from normal principles of NEPA or DOD regulations. For, in fact, any EIS prepared prior to the effectuation of a project is and should be hypothetical since it is only after a full and adequate EIS is completed that the decision maker is in a position to decide whether to carry out any proposed federal project as planned. Any other course would render NEPA meaningless and would constitute not only an extraordinary waste of scarce government finances, but worse, constitute a total fraud on the public whose elected representatives created NEPA.

there is considerable information concerning nuclear weapons, nuclear accidents, and weapons storage in the public domain.

1. Questions involving unclassified information. The court below directed petitioners to examine the degree to which the physical proximity of airports enhanced the risk of nuclear accident at West Loch. In other words, petitioners must examine, among other things, the likelihood of an airplane crashing into any one of the newly constructed bunkers on takeoff or landing. Despite the fact that an "accident potential zone"[4/] can be calculated, astoundingly, it has never been calculated for the Honolulu International Airport, although it has been proposed by both the State of Hawaii and

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4/ An accident potential zone is "a rough measure of the risk that an airplane will crash on (a) piece of ground" (Tr. p. 27; "Tr." hereinafter refers to the Transcript of Proceedings in District Court which are part of the record in this case).

airport officials (Tr. p. 144), and nuclear weapons may be stored close by. Even petitioners' own classification expert indicated at trial that the numbers or locations of airplane accidents in Hawaii (information essential to the calculation of an accident potential zone) are not classified[5/] (Tr. p. 217). Petitioners' classification expert also indicated that information concerning what would happen to a plane when it hit the ground[6/] (Tr. p. 221), the effects of that crash on the surrounding area (Tr. p. 222), the number of nuclear accidents (Tr. p. 218), the fact of a nuclear accident (Tr. pp. 216, 223), and

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5/ In fact, there have been several accidents in which fully armed military planes have crashed into the ocean in the vicinity of West Loch (P-65, pp. 2-6; P-8, p. 4).

6/ For example, it is public knowledge that when a B-52 and KC-35 collided in mid-air and crashed in Palomares, Spain, two of the four nuclear weapons carried by the B-52 exploded and released radioactive material necessitating cleanup and removal of contaminated soil costing millions of dollars.

factors concerning the dispersal of plutonium (Tr. p. 221),[7] all involve unclassified information. These matters are, of course, exceedingly relevant to other questions to be answered in the EIS: "the risk of nuclear accidents" and "the effects

7/ For example, according to a study done by Lawrence Livermore Laboratories, "the destruction of a bunker containing several nuclear weapons could scatter tiny but measurable amounts of plutonium downwind over a 100 square mile area . . . within that area roughly fifty miles long and two miles wide -- the plutonium contamination of the soil would exceed the plutonium screening level recently proposed by the Environmental Protection Agency as safe for human habitation." Even after clean-up operations, "it would be virtually impossible to render a 100-square mile area completely safe by EPA's proposed plutonium screening level." (P-66, pp. 274-275).

Plutonium is, of course, one of the most toxic substances known (Tr. p. 101). According to petitioners' CEIS concerning the storage of nuclear weapons, "this material will not cause radiological damage to personnel, regardless of one's proximity, if kept outside the body." Petition, p. 32a. However, since plutonium in the air enters the body when we breathe, a witness for respondents stated that the statement in the CEIS constitutes "a cruel deception to the public with respect to a very potent carcinogen" because "it is in fact impossible to keep the plutonium 'outside the body' once it is in the air, water and food supply." (P-30, p. 2).

of any nuclear accidents upon the surrounding population and environment of Hawaii." Petition, p. 3a. Finally, petitioners' classification expert did not indicate any concern that examination of these questions would lead to the revelation of classified information.

2. Information in the public domain concerning nuclear weapons. Furthermore, even though petitioners may wish to keep secret some of the information relevant to the EIS, in fact it is often public knowledge. Petitioners have contended throughout that their regulations prohibit them from confirming or denying the presence of nuclear weapons. Petitioners refuse to recognize, however, that American citizens, particularly in Hawaii, are often aware when nuclear weapons are stored in their community. For regulations concerning the storage of nuclear weapons, which are

publicly available, readily identify the presence of such weapons by such factors as the type of fences, lighting and warning signs which accompany a nuclear storage facility. See, for example, DOD Directive, Security Criteria and Standards for Protecting Nuclear Weapons, July 30, 1974, No. 521041, Exh. I to Affidavit of James Albertini, March 16, 1978.

Petitioners finally seek to avoid their responsibility to fully examine the potential dangers of storing nuclear weapons at West Loch and urge review of the lower court decision by arguing as follows:

> The preparation of hypothetical EIS's for facilities where nuclear warhead storage is in fact contemplated conceivably would not place a significantly greater burden on the Navy than would the preparation of standard EIS's. But the preparation of hypothetical EIS's for facilities where such weapons are not likely to be stored would be expensive, unsettling, controversial, time-consuming and valueless.

Petition, p. 19.

This argument fails for several reasons and, like the arguments which precede it, does not justify review, by this Court, of the decision of the court below.

Firstly, the mandates of NEPA cannot be avoided because compliance therewith would be expensive, controversial or time consuming; second, it is not clear just what would be unsettling or who would be unsettled by the preparation of impact statements concerning the potential storage of nuclear weapons. If nearby residents would be unsettled if the final EIS indicated that such weapons pose a significant danger to their community, that EIS should, and presumably would, cause the decision maker to find a safer storage site.

But, finally, we are not here dealing with just some hypothetical site where nuclear weapons could never be stored, and

the EIS would be prepared for diversionary purposes (see Petition, pp. 18-19). For, as noted above, petitioners have stipulated that the West Loch bunkers, which are so very close to Honolulu International and two other airports, are nuclear capable. As the court below correctly stated:

> The public therefore must assume that at least the possibility exists that nuclear weapons, to the extent of the apparent capacity of the facility, . . . will be stored at West Loch. Thus, an EIS dealing with the consequences of such possibility would reveal nothing with respect to the likelihood of storage of which the public is not already aware.
>
> * * *
>
> Consideration of the four environmental factors specified by appellants as being critically important is essential if the decision maker is to be adequately prepared when the time for the decision respecting storage arrives.

Petition, p. 5a.

The safety, and possibly even the survival, of the people of Hawaii are at stake

herein. It is for this reason that NEPA places the responsibility of considering all relevant safety factors on the agency proposing a federal project by preparation of an Environmental Impact Statement.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: March 18, 1981

Respectfully submitted,

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No. 80-1377

In the Supreme Court of the United States

OCTOBER TERM, 1980

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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In the Supreme Court of the United States

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REPLY MEMORANDUM FOR THE PETITIONERS

Respondents express surprise that, having accepted the premise that the National Environmental Policy Act is applicable to the maintenance and storage of nuclear weapons, the Department of Defense should complain of the decision below. They assert that we have prematurely tendered the question whether public development, disclosure and dissemination of an environmental impact statement is required in circumstances like those involved in this case, insisting that the court of appeals "did not direct, or even address itself to, which portions of the EIS *must* be made public." Resp. Br. In Opp. 13-15. Only the briefest reply is called for.

In our view, there is no ambiguity about the ruling below. It expressly requires the "preparation of an EIS, *available*

to the public, generally assessing the impact [of storing nuclear weapons at West Loch]." Pet. App. 5a-6a (emphasis added). To be sure, such an EIS may be "hypothetical"—"without conceding, that the facility will be put to the use for which it has been made capable"—but it must disclose "factual information as to the consequences of storage to any specific extent * * * based on a series of hypotheses covering the range of options" presented by the particular facility. Pet. App. 6a. And, albeit hypothetically, the public assessment must consider the four factors identified by respondents. See Pet. App. 3a, 5a, 6a-7a. In sum, the court below has mandated that the Military Services publish a site-specific, detailed impact statement, revealing the potential effects of any possible nuclear storage, whenever a facility is capable of being put to such use.[1]

Our concern is that this rule, in many instances, would (1) require disclosure of classified information; (2) create a serious and unnecessary burden in preparing "hypothetical" impact statements for unreal situations in order to minimize revealing the actual sites and extent of nuclear storage; and (3) mislead and unsettle the public by suggesting possible risks where there are, in fact, no nuclear weapons stored, or a lesser number or less dangerous types, than is hypothetically assumed in the EIS. We have explained why this is so in our petition (at 12-19) and need not repeat our submission. We stress only that our quarrel with the decision below is not insofar as it requires the decision-maker to fully inform himself before acting, but only insofar as it compels public disclosure, in all cases, of

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[1] Presumably, the EIS must indicate the kind and scope of destructive impact for each category of nuclear weapon that may be stored at the facility and its susceptibility to accidental detonation. Most, if not all, of such information is plainly "restricted data" within the meaning of the Atomic Energy Act.

the fact or likelihood of nuclear storage at a specific site and the risks and potential effects of an accidental detonation, positing the full "series of hypotheses" respecting the number and types of nuclear weapons capable of storage there. For the reasons stated in our petition, however, we believe the latter requirement presents a substantial question meriting review here.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the United States Navy's alleged plan to store nuclear weapons in an ammunition storage facility on the island of Oahu, Hawaii must be the subject of a publicly-disclosed "hypothetical" environmental impact statement under the National Environmental Policy Act of 1969, even though such a statement of necessity would reveal military secrets.*

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* In addition to Secretary Weinberger, the petitioners are John F. Lehman, Secretary of the Navy; Admiral Thomas P. Hayward, Chief of Naval Operations; Rear Admiral Stanley J. Anderson, COMNAV Base Pearl Harbor; and Admiral Donald C. Davis, Commander-in-Chief of the Pacific Fleet. In addition to Catholic Action of Hawaii/Peace Education Project, and a second organization, Life of the Land, the respondents include James Albertini; Ian Yonge Lind; Eileen Belton; Peter Tagalog; Roger Sheetz; Edward Casey; and Nora Ogawa.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 643 F.2d 569. The opinion of the district court (Pet. App. 10a-15a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 8a) was filed on July 17, 1980. An order denying a petition for rehearing (Pet. App. 9a) was filed on October 10, 1980. On January 5, 1981, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including February 16, 1981. The petition was filed on February 14, 1981

and granted on April 6, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. 4332, reads, in pertinent part:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
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> * * * * *
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> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
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> (i) the environmental impact of the proposed action,
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> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
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> (iii) alternatives to the proposed action,
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> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
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> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
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> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special exper-

tise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes * * *.

2. The Atomic Energy Act of 1946, 42 U.S.C. (& Supp. III) 2011 *et seq.*, provides, in pertinent part:

42 U.S.C. 2014.

* * * * *

(y) The term "Restricted Data" means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 2162 of this title.

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42 U.S.C. 2161.

It shall be the policy of the Commission to control the dissemination and declassification of Restricted Data in such a manner as to assure the common defense and security. Consistent with such policy, the Commission shall be guided by the following principles:

(a) Until effective and enforceable international safeguards against the use of atomic energy for destructive purposes have been established by an international arrangement, there shall be no exchange of Restricted Data with

other nations except as authorized by section 2164 of this title; and

(b) The dissemination of scientific and technical information relating to atomic energy should be permitted and encouraged so as to provide that free interchange of ideas and criticism which is essential to scientific and industrial progress and public understanding and to enlarge the fund of technical information.

42 U.S.C. 2162.

(a) *Periodic determination*

The Commission shall from time to time determine the data, within the definition of Restricted Data, which can be published without undue risk to the common defense and security and shall thereupon cause such data to be declassified and removed from the category of Restricted Data.

(b) *Continuous review*

The Commission shall maintain a continuous review of Restricted Data and of any Classification Guides issued for the guidance of those in the atomic energy program with respect to the areas of Restricted Data which have been declassified in order to determine which information may be declassified and removed from the category of Restricted Data without undue risk to the common defense and security.

(c) *Joint determination on atomic weapons; Presidential determination on disagreement*

In the case of Restricted Data which the Commission and the Department of Defense jointly determine to relate primarily to the military utilization of atomic weapons, the determination that such data may be published without consti-

tuting an unreasonable risk to the common defense and security shall be made by the Commission and the Department of Defense jointly, and if the Commission and the Department of Defense do not agree, the determination shall be made by the President.

(d) *Removal from Restricted Data category*

The Commission shall remove from the Restricted Data category such data as the Commission and the Department of Defense jointly determine relates primarily to the military utilization of atomic weapons and which the Commission and the Department of Defense jointly determine can be adequately safeguarded as defense information: *Provided, however,* That no such data so removed from the Restricted Data category shall be transmitted or otherwise made available to any nation or regional defense organization, while such data remains defense information, except pursuant to an agreement for co-operation entered into in accordance with section 2164(b) of this title.

(e) *Joint determination of the atomic energy programs*

The Commission shall remove from the Restricted Data category such information concerning the atomic energy programs of other nations as the Commission and the Director of Central Intelligence jointly determine to be necessary to carry out the provisions of section 403(d) of title 50 and can be adequately safeguarded as defense information.

* * * * *

42 U.S.C. 2166.

(a) Sections 2161 and 2165 of this title shall not exclude the applicable provisions of any

other laws, except that no Government agency shall take any action under such other laws inconsistent with the provisions of those sections.

(b) The Commission shall have no power to control or restrict the dissemination of information other than as granted by this or any other law.

42 U.S.C. 2277.

Whoever, being or having been an employee or member of the Commission, a member of the Armed Forces, an employee of any agency of the United States, or being or having been a contractor of the Commission or of an agency of the United States, or being or having been an employee of a contractor of the Commission or of an agency of the United States, or being or having been a licensee of the Commission, or being or having been an employee of a licensee of the Commission, knowingly communicates, or whoever conspires to communicate or to receive, any Restricted Data, knowing or having reason to believe that such data is Restricted Data, to any person not authorized to receive Restricted Data pursuant to the provisions of this chapter or under rule or regulation of the Commission issued pursuant thereto, knowing or having reason to believe such person is not so authorized to receive Restricted Data shall, upon conviction thereof, be punishable by a fine of not more than $2,500.

3. 18 U.S.C. 793 provides, in pertinent part:

* * * * *

(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance,

or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it * * * [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

1. During the early 1970's, many Hawaiians protested against the alleged storage of nuclear weapons at the Waikele branch of the Lualualei Naval Magazine on the island of Oahu, near Waipahu. Exhibit K to plaintiff's Motion for Preliminary Injunction, filed Mar. 20, 1978. They contended that the moving of nuclear weapons to and from the base by truck and helicopter, as well as the storage of such weapons at the base, constituted a hazard to all who lived in the heavily populated area surrounding Waikele (*ibid.*). The Department of the Navy neither admitted nor denied that nuclear weapons were being stored at Waikele since information relating to whether or not an installation is a storage site for nuclear weapons is classified.[1]

In 1974 and 1975, Navy officials undertook to transfer the ammunition and weapons stored at Waikele and elsewhere on Oahu to the West Loch branch of the Lualualei Naval Magazine, which had

[1] See pages 14-17, *infra*.

been used by the Navy for general storage since 1942 and for ordnance storage since 1959 (Pet. App. 12a). The transfer to West Loch of additional ordnance required the construction there of additional magazines and associated buildings, all of which were duly authorized by Acts of Congress.

In 1975, the Department of the Navy prepared an environmental impact assessment (Pet. App. 17a-26a) of how, if at all, the relocation to West Loch of the Waikele functions would affect the environment.[2] This assessment, which as eventually released made no mention of nuclear weapons, concluded that the construction of 48 earth covered magazines and associated buildings and the provision of security for those buildings would have no significant environmental impact. The assessment also concluded that "[t]here are no known significant species [of plants or animals] on the [construction] site" (Pet. App. 20a) and that the nearby Okiokiolepe fish pond (which is listed on the National Register of Historic Places) would not be affected. Consequently, no formal environmental impact statement was prepared at the construction stage. Three years later, the Department of the Navy prepared a "candidate" or generic environmental impact statement on "Nuclear Aspects of Naval Weapons Systems Storage" (*id.* at 27a-35a) which discussed in general terms, without reference to any specific storage site or surrounding locality, whether nuclear accidents could or were likely to occur, whether a nuclear accident could or would be likely to release radiation, and the extent to which

[2] The document prepared in 1975 was not, strictly speaking, an environmental impact "assessment." It was, and remains, classified. In June of 1977, that document was revised, and a portion of it was declassified and released to the public as an environmental impact assessment. The item reprinted in the Appendix to the petition is the declassified, publicly-available assessment.

stored nuclear warheads release low-level radioactive emissions.

In March of 1977, a contract was let for the construction of 30 of the projected 48 magazines. In April 1978, another contract was let for the remaining magazines, security fences, a guard house and other facilities (Pet. App. 2a). Work under both contracts has been completed and the magazines are in use.

2. In March of 1978, several groups and individuals who live near or engage in recreational activity in and around West Loch and who allege that the storage facility at West Loch is destined to house nuclear warheads, filed this action to enjoin the Secretary of Defense and various Navy officials from expanding the facility until they had complied with, *inter alia*, the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. (& Supp. III) 4321 *et seq.*, the Endangered Species Act of 1973, 16 U.S.C. (& Supp. III) 1531 *et seq.*, and the National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.* (J.A. 4-11).

Following a hearing on the merits, the district court concluded (Pet. App. 10a-15a) that the proposed activity does not violate the latter two statutes. With respect to NEPA, the court held that although the construction and use of the storage facilities at West Loch would constitute major federal action within the meaning of Section 102 of NEPA (42 U.S.C. 4332), complete compliance with the Act was not possible since an environmental impact statement would include a discussion of the presence, number and location of nuclear weapons, of their design, utilization, capabilities and capacities, and of security measures and other devices associated with the storage and use of such weapons, and would therefore conflict with the security data provisions of the Atomic Energy Act of 1946, 42 U.S.C. (& Supp. III)

2011 *et seq.*, and with various federal regulations governing the disclosure of restricted and confidential information. Concluding that the Navy already had complied with NEPA "to the fullest extent possible," the district court entered judgment against the plaintiffs (Pet. App. 14a, 16a).

The court of appeals reversed (Pet. App. 1a-7a), and directed the Navy to prepare a "hypothetical" environmental impact statement assessing the "potential consequences of the storage of nuclear weapons at this particular site[,] [taking into] [c]onsideration * * * four environmental factors specified by [the plaintiffs] as being critically important * * *" (*id.* at 5a).[3] The court of appeals also directed the district court to reconsider, in light of the information contained in any such hypothetical environmental impact statement, whether the proposed expansion of the facility at West Loch implicated the National Historic Preservation Act of 1966 or the Endangered Species Act of 1973. Finally, the court of appeals "le[ft] to the district court the question whether injunctive relief is proper at this time" (*id.* at 7a).[4]

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[3] The four factors are: the risk of nuclear accidents; the enhancement of that risk by the proximity of West Loch to three airports; the likely effects of a nuclear accident on the population and environment surrounding West Loch; and the effects of continued low-level radiation from nuclear warheads stored near populated areas. See Pet. App. 3a.

[4] On remand, the respondents have moved to enjoin, pending the filing of a hypothetical environmental impact statement, the movement of nuclear weapons into the West Loch storage facility, and to require the Navy to remove from West Loch any nuclear weapons already stored there. On March 25, 1981, the district court deferred consideration of the respondents' motion "until a date subsequent to disposition of this matter by the United States Supreme Court * * *."

SUMMARY OF ARGUMENT

Since the Navy consistently has acted on the premise that in general NEPA applies to all of its activities that significantly affect the quality of the human environment, including the expansion and operation of the ordnance storage facility at West Loch, the issue in this case is limited to whether the provisions of NEPA relating to the *public development, disclosure and dissemination* of environmental impact statements invariably must be complied with, even where such compliance is likely to reveal military secrets.

The court of appeals attempted to steer a middle course between NEPA's disclosure requirements and the secrecy that, by statute, must attend nuclear installations. The resultant compromise—a publicly available "hypothetical" environmental impact statement—although perhaps reasonable in concept, is quite unworkable in practice. Any EIS, including one based on a series of hypotheses, that is responsive to the environmental concerns articulated by the court of appeals, would necessarily reveal highly classified information about the types of weapons in our nuclear arsenal, their design and capabilities, the design, capacities and vulnerabilities of the facilities in which they are stored, and the security measures employed in connection with them. The only way to avoid such a consequence would be to draft an EIS that in its unclassified form is so abstract, general and incomplete as to be, if not incomprehensible, of no appreciable benefit to anyone not privy to classified annexes. And neither of these unsatisfactory alternatives would provide the decisionmaker—the Navy—with as much usable information about the actual environmental impact of its true plans as would a "real," albeit wholly classified, EIS. Thus, the lower

court's creation neither serves the purposes of, nor is compelled by, the National Environmental Policy Act of 1969. Moreover, the requirement that the Navy file a hypothetical EIS in connection with the West Loch storage facility would necessitate the preparation of similar EIS's for every other facility capable of storing nuclear weapons, without regard for whether such storage is actually contemplated, lest filing or the failure to file be taken as a key to where weapons are to be stored. The consequent administrative burdens far outstrip any the court of appeals reasonably could have anticipated or intended.

ARGUMENT

THE PUBLIC DISCLOSURE OF AN ENVIRONMENTAL IMPACT STATEMENT, INCLUDING A "HYPOTHETICAL" STATEMENT, CONCERNING THE STORAGE OF NUCLEAR WEAPONS AT A PARTICULAR SITE, WOULD NECESSARILY REVEAL CLASSIFIED AND RESTRICTED MILITARY INFORMATION THAT BY STATUTE MUST REMAIN SECRET

The general applicability of NEPA to the Navy and to its weapons storage activities is not in dispute here. Without confirming or denying that nuclear weapons are presently or might in the future be stored at West Loch, the Navy consistently has acted on the premise that NEPA applies to its expansion and operation of the ordnance facility there. This is because the Department of Defense assumes that NEPA applies to all of its activities, classified and unclassified, including such highly classified actions as the maintenance and storage of nuclear warheads. Indeed, the Department's regulations on that score are unequivocal: "[t]he fact that a proposed action is of a classified nature does not relieve the proponent

of the action from complying with the requirements of [NEPA as set forth in the Department's implementing regulations]" (32 C.F.R. 214.8(i) (1979)).

In such circumstances, however, the same regulation goes on to provide that "[e]nvironmental statements, both draft and final, shall be prepared, safeguarded, and disseminated in accordance with the requirements applicable to classified information * * *."[5] Thus, the crucial question is not whether the Navy must or will comply with NEPA insofar as that statute compels *decisionmakers* to take specified steps to inform themselves of, and take into account, the environmental consequences of the actions they propose. Rather, at issue is whether the provisions of NEPA relating to the *public development*,

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[5] The regulation also provides that "[w]hen feasible, these statements shall be organized in such a manner that classified portions can be included as annexes, so that the unclassified portions can be made available to the public." 32 C.F.R. 214.8(i) (1979). Regulations of the Council on Environmental Quality (CEQ), whose "interpretation of NEPA is entitled to substantial deference" (*Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979)), are to the same effect (40 C.F.R. 1507.3(c) (1979)):

> Agency procedures may include specific criteria for providing limited exceptions to the provisions of these regulations for classified proposals. They are proposed actions which are specifically authorized under criteria established by an Executive Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order or statute. Environmental assessments and environmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.

disclosure and dissemination of environmental impact statements invariably must be complied with, even where such compliance is likely to reveal military secrets.

A. The Atomic Energy Act prohibits the public disclosure of the fact that a specific military facility is a storage site for nuclear weapons, and of information relating to the design, capacity, and vulnerability of the site and the nature of the weapons stored there

The Atomic Energy Act of 1946, 42 U.S.C. 2011 *et seq.*, declares that all data concerning the design, manufacture or utilization of atomic weapons are "'Restricted Data'" (42 U.S.C. 2014(y)), and requires the Atomic Energy Commission [6] to control the dissemination and declassification of such data "in such a manner as to assure the common defense and security" (42 U.S.C. 2161). The Atomic Energy Commission can, and indeed must, from time to time determine whether Restricted Data may, "without undue risk to the common defense and security," be declassified and published. 42 U.S.C. 2162(a). Where Restricted Data relate primarily to the military utilization of atomic weapons, the determination must be made jointly by the Commission and the Department of Defense. 42 U.S.C. 2162(c). Whenever the

[6] The Atomic Energy Commission was abolished and its functions under 42 U.S.C. 2162 transferred to the Energy Research and Development Administration on October 11, 1974. Pub. L. No. 93-438, 88 Stat. 1233. The Energy Research and Development Administration, in turn, was terminated and its functions under 42 U.S.C. 2162 transferred to the Department of Energy on August 4, 1977. Pub. L. No. 95-91, Title III, Section 301, 91 Stat. 577. Except where the context dictates otherwise, our references to the Atomic Energy Commission apply to its successor agencies as well.

Commission and the Department conclude that information relating to the military utilization of atomic weapons should no longer be restricted but at the same time should not be declassified, and that it can be "adequately safeguarded as defense information" (42 U.S.C. 2162(d)), they may lift its Restricted Data designation and thereafter apply to it the safeguards used to protect other classified defense information. See S. Rep. No. 1699, 83d Cong., 2d Sess. 8 (1954). Such information is designated by the military as "Formerly Restricted Data." [7]

The communication of Restricted Data to anyone not authorized by the Atomic Energy Act of 1946 to receive it is a criminal offense, punishable by a fine of not more than $2,500. 42 U.S.C. 2277. The furnishing of national defense information to an unauthorized person is a criminal offense, punishable by a fine of not more than $10,000 or imprisonment for not more than 10 years, or both. 18 U.S.C. 793.

To ensure that Formerly Restricted Data are "adequately safeguarded as defense information," the Energy Research and Development Administration [8] and the Department of Defense developed a Nuclear Weapons Classification Guide, CG-W-4 (Pet. App. 36a-45a).[9] That guide indicates generally what classification, if any, is to be given to various types of information. "U" means Unclassified, "C" means

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[7] There is a further proviso to the effect that no Formerly Restricted Data may be "transmitted or otherwise made available to any nation or regional defense organization, while such data remain defense information, except pursuant to an agreement for co-operation" entered into as elsewhere provided for in the Atomic Energy Act of 1946 (42 U.S.C. 2162(d)).

[8] See note 6, *supra*.

[9] Although the guide is itself classified, portions of it have been declassified in connection with this litigation.

Confidential, "S" means Secret, and "TS" means Top Secret. "FRD" means Formerly Restricted Data. The following types of information, most of which are Formerly Restricted Data, require classifications ranging, depending upon the circumstances, from Confidential to Top Secret:

Item 1711: Planning or construction information revealing that installation is a nuclear weapons storage site (C-TS; FRD);

Item 1721: Information revealing installation is a storage site for nuclear weapons, whether or not presence of weapons can be determined (C-TS; FRD);

Item 1732: Quantity of nuclear weapons actually at a site (C; FRD);

Item 1742: Overall security measures for a site (S-TS);

Item 1743: Defensive plans for storage sites (S-TS);

Item 1744: Storage site vulnerability studies (S-TS);

Item 1752: That a particular Nuclear-Capable Unit actually has nuclear weapons (C-TS; FRD);

Item 1755: Number of nuclear weapons in storage or with a Nuclear or Nuclear-Capable Unit (C-TS; FRD).

The Department of the Navy has issued a classified manual entitled Navy Security Classification Guide for Nuclear Weapons, Navy SWOP 55-1 (Pet. App. 46a-56a) that follows the same classification scheme. The first seven items listed in the paragraph

above appear in the Navy Manual as items 2-11.1, 2-11.2, 2-11.6.2, 2-11.7.2, 2-11.7.3, 2-11.7.4, and 2-11.8.2, respectively.[10] The Navy also has issued to all its members an unclassified general directive, designated OPNAV INSTRUCTION 5721.1C (Pet. App. 57a-59a), forbidding them from revealing any information relating to the presence or absence of nuclear weapons or components on board any ship, station or aircraft.

It is readily apparent from this directive, from the nuclear weapons classification guides, and from the statute they implement, that information relating to the location, design, capacity, vulnerability and security of nuclear weapons storage sites, and to the design of the weapons themselves, is restricted or classified information, the disclosure of which is prohibited.

B. NEPA does not require the public disclosure of information that by statute must remain secret

The National Environmental Policy Act of 1969 provides that "to the fullest extent possible" federal agencies shall (42 U.S.C. 4332(2)):

> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
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> (i) the environmental impact of the proposed action,
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> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
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> (iii) alternatives to the proposed action,

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[10] The eighth item undoubtedly also is listed in the Navy Manual, but not in the portion that has been declassified and made a part of the record in this case.

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

* * * * *

That same section obligates federal agencies to consult with affected sister agencies and obtain their comments prior to making an environmental impact statement. Under NEPA, those comments as well as the comments and views of appropriate state and local agencies shall, along with the impact statement, "be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5 [the Freedom of Information Act]" (42 U.S.C. 4332(2)(C)).

Despite (or perhaps because of) the breadth of its sweep and the specificity of its command, NEPA requires no more than that agencies comply with its policies "to the fullest extent possible." To be sure, as this Court cautioned in *Flint Ridge Dev. Co.* v. *Scenic Rivers Ass'n*, 426 U.S. 776 (1976), that phrase "is neither accidental nor hyperbolic" and "is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle." *Id.* at 787. Nevertheless, the phrase is also a limitation that "recognizes * * * that where a clear and unavoidable conflict in statutory authority exists, NEPA must give way. As [the Court] noted in *United States* v. *SCRAP*, 412 U.S. 669, 694 (1973), 'NEPA was not intended to repeal by implication any other statute.'" *Id.* at 788. It therefore follows from NEPA itself that to the extent its public disclosure provisions cannot be reconciled with the nondisclosure provisions of the Atomic Energy Act of 1946, the latter must

prevail. Cf. *NRDC* v. *Berklund*, 609 F.2d 553, 558-559 (D.C. Cir. 1979). The same conclusion is dictated by the Atomic Energy Act of 1946 which expressly directs, at 42 U.S.C. 2166(a), that "no Government agency shall take any action under * * * other laws inconsistent with the [Atomic Energy Act's] provisions" governing restricted and classified information.

Moreover, insofar as disclosure to the public (as distinct from disclosure to sister agencies or other branches of government) of classified information is at issue, the disclosure requirements of NEPA and the nondisclosure requirements of the Atomic Energy Act of 1946 are not in conflict. NEPA provides that environmental impact statements and related comments shall be made available "to the public as provided by" the Freedom of Information Act. 42 U.S.C. 4332(2)(C). The latter statute, by its own terms, "does not apply to matters that are * * * specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and * * * are in fact properly classified pursuant to such Executive order" (5 U.S.C. 552(b)(1)). Executive Order No. 12065, 43 Fed. Reg. 28949 (1978) confers upon specified officials, including the Secretaries of Defense and Energy,[11] the power to classify information if its release would pose a threat to national security. Pursuant to that Order and its predecessors,[12] the Secretary of Defense has, together with the Secretary of Energy where Form-

[11] The Secretary of Energy is the most recent successor to the Chairman of the Atomic Energy Commission with respect to the classification and declassification of restricted data. See note 6, *supra*.

[12] Executive Order No. 12065 superseded Exec. Order No. 11652, 37 Fed. Reg. 5209 (1972), which was in effect from June 1, 1972 until December 1, 1978. That order, in turn, superseded Exec. Order No. 10501, 18 Fed. Reg. 7049 (1953).

erly Restricted Data are involved, placed a Confidential, Secret or Top Secret stamp on virtually all information relating to the storage of nuclear weapons. See pages 15-17, *supra*. Thus, were an environmental impact statement to address nuclear weapons storage, it would be exempt from the Freedom of Information Act (see *EPA* v. *Mink*, 410 U.S. 73, 84 (1973)) and, hence, from the public disclosure provisions of NEPA.

C. A publicly-disclosed environmental impact statement would reveal whether nuclear weapons are stored at a specific site, contrary to the Atomic Energy Act and its implementing regulations

Quite obviously, an environmental impact statement that acknowledged that nuclear weapons were (or were to be) stored at a particular site would violate the Atomic Energy Act of 1946. That vice could not be cured by dividing the EIS into an unclassified document that is disclosed to the public and classified appendices that are not. For, so long as the publicly-available document is directed at the storage of nuclear weapons, secrecy is breached.

The result, admittedly, may be that in some situations no meaningful adversary proceeding can be pursued. But, occasionally, "some of the interests of the adversary process are outweighed by the nation's legitimate interests in secrecy and orderly process for disclosure." *Hayden* v. *Nat'l Security Agency/Central Security Service*, 608 F.2d 1381, 1385 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980). In *United States* v. *Reynolds*, 345 U.S. 1 (1953), where the widows of persons who had died in the crash of a military aircraft sought from the government certain classified documents in connection with their claims for damages under the Tort Claims Act, the Court sanctioned the withholding of the documents, stating (*id.* at 11) that "even the most compelling necessity cannot overcome the claim of

privilege if the court is ultimately satisfied that military secrets are at stake." In a footnote to this statement, the Court referred to *Totten* v. *United States*, 92 U.S. 105 (1875), "where the very subject matter of the action, a contract to perform espionage, was a matter of state secret. The action was dismissed on the pleadings without ever reaching the question of evidence, since it was so obvious that the action should never prevail over the privilege." [13] 345 U.S. at 11.

To be sure, it is in theory possible to produce a statement without disclosing the nature of the governmental activity covered by it. But it is difficult to comprehend how the environmental impacts of that activity could be meaningfully explored. Moreover, even assuming that a subject-less statement would have some utility, unless environmental impact statements directed at the storage of *conventional* weapons were treated in a similar manner, the disparity would reveal that which the Atomic Energy Act of 1946 says must be kept secret—the location of nuclear weapons.[14]

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[13] See also *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268 (4th Cir. 1980) (en banc). Cf. *C. & S. Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *Pauling* v. *McElroy*, 278 F.2d 252, 254 (D.C. Cir.), cert. denied, 364 U.S. 835 (1960); *Pauling* v. *McNamara*, 331 F.2d 796, 798 (D.C. Cir. 1963), cert. denied, 377 U.S. 933 (1964); *Luftig* v. *McNamara*, 373 F.2d 664, 665-666 (D.C. Cir. 1967); *McQueary* v. *Laird*, 449 F.2d 608, 612 (10th Cir. 1971); *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F.2d 796, 798 (D.C. Cir.), application for injunction denied, 404 U.S. 917 (1971); *Concerned About Trident* v. *Rumsfeld*, 555 F.2d 817, 831 (D.C. Cir. 1976) (concurring opinion).

[14] Indeed, to the extent that EIS's for conventional weapons storage sites are unclassified, the secrecy mandated by the Act would be breached even by public disclosure of the fact that a classified EIS had been prepared.

D. The hypothetical environmental impact statement envisioned by the court of appeals would, of necessity, disclose classified information regarding the types of nuclear weapons the United States has developed, the design and destructive capability of such weapons, the design of the facilities in which they are stored, the capacities of such facilities and their vulnerabilities, and the steps taken to safeguard them

The court of appeals apparently recognized that a standard environmental impact statement, if publicly disclosed, inevitably would reveal military secrets. In order to avoid that consequence while at the same time honoring NEPA, the court suggested at oral argument and developed in its opinion the concept of an EIS that would "hypothesiz[e], without conceding, that the [West Loch] facility will be put to the use for which it has been made capable," and would draw conclusions "based on a series of hypotheses covering the range of options which the facility has openly presented to the Secretary [of the Navy]" (Pet. App. 6a; footnote omitted).[15] The resultant hypothetical EIS [16] concededly would have the

[15] The Navy stipulated, for purposes of this case, that the West Loch facility is "capable" of storing nuclear weapons. Based on that stipulation, the court of appeals opined: "[t]he public therefore must assume that at least the possibility exists that nuclear weapons, to the extent of the apparent capacity of the facility (assuming that capacity would be apparent to a knowledgeable observer), will be stored at West Loch" (Pet. App. 5a).

[16] In preparing environmental impact statements, federal agencies often must set forth hypothetical accident scenarios in order to present the necessary spectrum of potential environmental effects to which a fixed governmental action might give rise. Here, however, the court of appeals would compel the Navy not only to speculate about future disasters, but also to "hypothesize" about the nature of the threshold actions in which it may, or may not, be engaged.

virtue of neither confirming nor denying that nuclear weapons are being stored at a particular site,[17] and would keep secret the actual nuclear firepower at the Navy's disposal. However, even a hypothetical EIS would perforce disclose other information that is equally (or, in some cases, more highly) classified.

For example, were an EIS to hypothesize that a particular facility might store nuclear warheads of type A, that hypothesis would reveal that somewhere in our nuclear arsenal there exist weapons of type A. Similarly, an EIS that addressed, even as a hypothetical matter, the risk that a type A warhead might inadvertently be detonated, and the destructive forces, if any, that such a detonation would unleash, would of necessity touch upon the design of the weapon, its payload, and its destructive capability. Also pertinent would be the design and vulnerability, *vel non*, of the storage site, and the safety and security devices and measures surrounding it.

It may be thought that in a hypothetical EIS, at least, the disclosure of secret information could be avoided through the use of classified annexes. But here, too, seemingly innocuous information is inextricably intertwined with other information which must be kept secret. In view of the inescapable imperative that the Navy must err, if at all, on the side of nondisclosure, the publicly-available portion of a partially-classified hypothetical EIS undoubtedly would, in most instances and respects, be incomprehensible, or would be so abstract, general and incomplete as to be of no appreciable benefit to Congress, sister agencies, or the general public. Nor would the

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[17] However, the fact of its preparation and dissemination would signal the storage of nuclear weapons unless "cover" hypothetical EIS's were filed in connection with other facilities. See page 24, *infra*.

Navy benefit from such an exercise. NEPA's overriding mandate that decisionmakers inform themselves of the environmental consequences of their proposed actions and take those considerations into account can best be served by the preparation, where appropriate, of a "real" EIS directed to the Navy's true plans, even if little, or none of the statement is released to the public.

Finally, the court of appeals' attempt to reconcile the irreconcilable would impose inordinate, and presumably unintended, administrative burdens on the Navy. The preparation of hypothetical EIS's for facilities where nuclear warhead storage is in fact contemplated probably would not place a significantly greater burden on the Navy than would the preparation of standard EIS's. But once the Navy prepares and disseminates an EIS hypothesizing the storage of nuclear weapons at one facility, it logically must do the same for every other facility capable of storing such weapons, for if hypothetical EIS's were prepared and disseminated only for those facilities where nuclear weapons in fact are stored, the EIS would serve as a kind of paper signpost advertising the site's existence and purpose. Consequently, hypothetical EIS's would have to be prepared not only for facilities actually capable of storing nuclear weapons, but for facilities perceived to have that capability as well, lest those who have guessed wrong be given a more accurate picture of our nuclear strength and flexibility. The make-believe make-work activity thus required to comply with the court of appeals' decision and at the same time preserve military secrets, in addition to entailing the expenditure of millions of dollars, would be unsettling,[18] controversial, time-

[18] Since a hypothetical EIS would have to be prepared for each ordnance facility conceivably capable of storing nu-

consuming (for the courts as well as for the Department of Defense),[19] and ultimately valueless. That effort is neither required by, nor does it serve the ends of, the National Environmental Policy Act of 1969.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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MAY 1981

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clear warheads, the average citizen necessarily would have a disconcertingly inflated impression of the amount of nuclear weaponry that surrounds him or her. Moreover, the hazards that attend nuclear installations would be similarly inflated since the "series of hypotheses" called for by the court of appeals necessarily would include worst-case scenarios much worse than any actually presented by a nuclear storage facility.

[19] Indeed, it is conceivable that the issue of the adequacy under NEPA of a completely fictional EIS could give rise to acrimonious litigation lasting several years, occupying the time and resources of many members of the bench and bar.

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IN THE

Supreme Court of the United States

October Term, 1980

No. 80-1377

CASPAR W. WEINBERGER,
Secretary of Defense, et al.,
Petitioners,

—v.—

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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Question Presented

Whether, particularly in light of Department of Defense (DOD) regulations providing for preparation of an Environment Impact Statement (EIS), even where information involved may be classified, the United States Court of Appeals was correct in ruling that the Navy must comply with the EIS provisions of the National Environmental Policy Act and prepare an EIS examining the environmental consequences of building facilities, which petitioners admit are capable of storing nuclear weapons, in close proximity to the Honolulu International Airport and two military airports?

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D. ENVIRONMENTAL IMPACT STATEMENT PHASE

10. *Classified Material.* It may be necessary for DoD Components to include classified material in environmental documentation. Classified information in environmental documents shall be safeguarded in accordance with Executive Order 12065 implemented by DoD 5200.1-R (32 CFR Part 159). The requirements for circulation (CEQ 1502.19) and public involvement (CEQ 1506.6) do not apply to classified environmental documents except where segregation of material and circulation and involvement can be accomplished consistently with the provisions of DoD 5200.1-R. When feasible, environmental documents may be organized in such a manner that classified portions can be included as annexes so that unclassified portions can be made available to the public in the normal manner. This normally will not be possible when the proposal itself is classified.

Executive Order 12065, 43 Fed. Reg. 28949 (1978) states in pertinent part:

> SECTION 1. ORIGINAL CLASSIFICATION.
>
> 1-1. *Classification Designation.*
>
> 1-101. Except as provided in the Atomic Energy Act of 1954, as amended, this Order provides the only basis for classifying information. Information may be classified in one of the three designations listed below. If there is reasonable doubt which designation is appropriate, or whether the information should be classified at all, the less restrictive designation should be used, or the information should not be classified.
>
> * * *

3-3. *Declassification Policy.*

3-301. Declassification of classified information shall be given emphasis comparable to that accorded classification. Information classified pursuant to this and prior Orders shall be declassfied as early as national security considerations permit. Decisions concerning declassification shall be based on the loss of the information's sensitivity with the passage of time or on the occurrence of a declassification event.

3-302. When information is reviewed for declassification pursuant to this Order or the Freedom of Information Act, it shall be declassified unless the declassification authority established pursuant to Section 3-1 determines that the information continues to meet the classification requirements prescribed in Section 1-3 despite the passage of time.

3-303. It is presumed that information which continues to meet the classification requirements in Section 1-3 requires continued protection. In some cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified. When such questions arise, they shall be referred to the agency head, a senior agency official with responsibility for processing Freedom of Information Act requests or Mandatory Review requests under this Order, an official with Top Secret classification authority, or the Archivist of the United States in the case of material covered in Section 3-503. That official will determine whether the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure.

Statement of the Case

This case presents the question of whether the Navy must prepare an EIS in connection with its plan to store nuclear weapons one mile from a major flight path into the Honolulu International Airport and in close proximity to two smaller military airports in an area which is experiencing the greatest rate of population growth anywhere in Hawaii.

In 1975, the Navy prepared an Environmental Impact Assessment (EIA) in connection with its plan to transfer weapons then stored at the Waikele branch of the Lualualei Naval Magazine on the Island of Oahu, Hawaii,[1] to the West Loch branch of the Naval Magazine, in close proximity to the three airports.

Noting that weapons had been stored at West Loch since 1959, the EIA concluded that increasing the number of weapons would have no significant impact on the environment, and thus an Environmental Impact Statement (EIS) was not necessary. The EIA did not, however, take into consideration that the existing weapons were conventional, and that the new weapons would include nuclear weapons.[2]

---

[1] Substantial evidence in the record, including but not limited to photographs of weapons, indicates that nuclear weapons were being stored at Waikele. P-47 through P-51 (plaintiffs' exhibits at trial); Affidavit of James Albertini, dated March 16, 1978.

[2] Petitioners have stated that the EIA which is part of this record is the declassified portion of a document prepared in 1975. Brief for the Petitioners, hereinafter, Br. Pet. p. 8. In three years of litigation there has been no assertion by petitioners that the portions of the document which remain classified consider the environmental consequences of storing nuclear rather than conventional weapons, or any of the peculiar hazards created by the proximity of an airport.

In 1978, the Navy prepared a short "Candidate" Environmental Impact Statement (CEIS) concerning the general effects of storing nuclear weapons.

It did not however consider the potential implication of storing nuclear weapons in close proximity to airports, or what might occur if a plane crashed into a storage bunker containing one or more nuclear weapons. Nor did it adequately examine the dangers which result when a nuclear weapon is damaged and plutonium is released in the air. Rather, it tried to ignore those dangers by stating:

> This material will not cause radiological damage to personnel, regardless of one's proximity, if kept outside the body. Petition for Certiorari, Appendix (hereinafter Pet. App.) G, p. 32a.

In March, 1978, this action was filed by several organizations and individuals concerned with protecting the environment and reducing the dangers to residents of Hawaii posed by nuclear weapons.[3] Plaintiffs, respondents herein, sought an order requiring the Navy to prepare an EIS examining the environmental consequences of building nuclear capable storage facilities and storing nuclear weapons at West Loch.

Following a hearing on the merits, the District Court dismissed the case on the grounds that "restrictions of the security classification guides and the Atomic Energy Act" prohibited preparation of an EIS, and that therefore

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[3] Plaintiffs (respondents) in this action are Catholic Action of Hawaii/Peace Education Project; Life of the Land; James Albertini; Ian Yonge Lind; Eileen Belton, Peter Tagalog; Roger Sheetz; Edward Casey and Nora Ogawa. Defendants (petitioners) are Casper W. Weinberger, Secretary of Defense; John F. Lehman, Secretary of the Navy; Admiral Thomas P. Hayward, Chief of Naval Operations; Rear Admiral Stanley J. Anderson, COMNAV Base, Pearl Harbor; and Admiral Donald D. Davis, Commander-in-Chief of the Pacific Fleet.

the Navy had complied with NEPA to the fullest extent possible. Pet. App. D, p. 14a.

On July 17, 1980, the decision of the District Court was reversed by the United States Court of Appeals for the Ninth Circuit stating:

> We conclude that while the district court correctly held that the West Loch project was major federal action, it erred in holding that the Navy has complied with NEPA to the fullest extent possible. We conclude that the EIA and CEIS provided by the Navy are inadequate and that an EIS is required under the provisions of NEPA.

Pet. App. A., p. 7a.

The Navy takes the position that it can neither confirm nor deny the presence of nuclear weapons at West Loch (or anywhere else for that matter). However, under its regulations, the question of whether a facility is capable of storing nuclear weapons is not classified and in the course of this litigation petitioners have stipulated that the new bunkers constructed at West Loch are nuclear capable. As the court below stated:

> the public therefore must assume that at least the possibility exists that nuclear weapons . . . will be stored at West Loch. Pet. App. A., p. 5a.

Nonetheless, petitioners have failed to examine, in the CEIS or elsewhere, the following questions which the court below considered essential to any decision to store nuclear weapons at West Loch:

(1) The risk of nuclear accidents;

(2) the enhancement of that risk by the physical proximity of the airports;

(3) the effects of any nuclear accident upon the surrounding population and environment of Hawaii; and

(4) the effects of continual low-level radiation from the storage of the weapons near populated areas.

Pet. App. A., pp. 3a and 5a.

Summary of Argument

Petitioners have built facilities capable of storing nuclear weapons at the West Loch branch of the Lualualei Naval Magazine, one mile from a major flight path to the Honolulu International Airport and adjacent to two military airports as well. The bunkers are located in the Pearl Harbor area of Oahu, the area experiencing the most rapid population growth on the island.

Despite the fact that a majority of fatal airplane crashes occur on takeoff or landing, petitioners have never prepared an Environmental Impact Statement (EIS) which would examine, among other things, the likelihood of an airplane crashing into the storage bunkers and the resulting injury to people and damage to the environment if such an accident did occur.

When the plan to build nuclear capable bunkers was first formulated, petitioners justified their failure to do an EIS on the basis that weapons were already being stored at West Loch, and thus building more facilities would not constitute a significant impact on the environment. They did not, however, consider the fact that the existing weapons were conventional, and since the new bunkers were to be nuclear capable, they must consider the significant differences in storing nuclear weapons.

After this litigation was begun, petitioners changed their justification for failing to prepare an EIS, claiming that there is a statutory conflict between the National Environmental Policy Act and the Atomic Energy Act, which, they claim, prohibits them from confirming or denying the presence of nuclear weapons in any particular location.

Petitioners' argument fails for several reasons. First, contrary to the petitioners' contentions, the Atomic Energy Act does not prohibit confirming the presence of nuclear weapons. Though once Restricted Data prohibited from disclosure by the Act, that information has been removed from the Act's protections and prohibitions. It is now considered Formerly Restricted Data and governed by an Executive Order which, among other things, expressly indicates that in appropriate circumstances classified information can be disclosed in the public interest.

Even if the specific storage of nuclear weapons were prohibited from disclosure by the Atomic Energy Act, however, failure to prepare an EIS would not be justified. Firstly, it is not necessary to confirm or deny the presence of nuclear weapons to prepare an EIS. The Impact Statement is and should normally be prepared *prior to* a final decision on a project involving major federal action. It is concerned with the environmental effects if a project were to be carried out; it is *not* a definitive statement that it will be. The only information that would be revealed by the preparation of an EIS for West Loch (or any other facility), therefore, is whether the facility is nuclear capable, and that fact is not even classified, let alone prohibited from disclosure by the Atomic Energy Act. Joint ERDA/DOD Nuclear Weapon Classification Guide, Pet. App. H., p. 37a, # 1721.

Repeatedly suggesting in their brief that the court below ordered an EIS, all portions of which would have to be available to the public, petitioners also argue that they cannot prepare an EIS because military secrets concerning numbers and design of nuclear weapons would be disclosed to the public. This argument fails as well. First, because the court below never even suggested that the entire EIS must be made public. Furthermore, petitioners ignore their own regulations which expressly provide that classified information can be placed in classified

annexes which would not be revealed to the public. DOD Reg. 32 C.F.R. 214.6(D)(10).

Finally, there is a substantial body of unclassified information which can be examined in public portions of an EIS such as the number and location of airplane accidents in Hawaii, the likelihood of an airplane crashing into the weapons bunkers, what would happen if a plane did crash into the bunkers, the area over which plutonium would be dispersed if a nuclear weapon were destroyed by fire or conventional explosion, and the effects of that plutonium on human health and the environment.

Preparation of an EIS is designed to accomplish two main purposes: (1) to inform the decision makers about the environmental consequences of contemplated projects so that the ultimate decisions will be informed and knowledgeable; and (2) to involve the public in the decision-making process as much as possible.

Even were every word classified, an EIS would have to be prepared in order to insure that the decision makers do not make decisions on the basis of faulty or incomplete information. Here the goal of public participation in the decision making process is particularly important since the question to be examined is the possibility of storing nuclear weapons at a cite particularly vulnerable to accidents, the consequences of which would be disastrous. Members of the public have a right and a duty to make certain that all relevant factors are examined by decision makers and to take action through the electoral process if they conclude that the decisions, which are so basic to their lives and safety, are made irresponsibly by government officials.

In particular, those who could be directly affected by a decision to store nuclear weapons at West Loch are entitled to as much information as possible concerning the

likelihood of a nuclear accident at West Loch so they can decide whether they wish to risk their lives and those of their children by living in the shadow of a facility designed to store nuclear weapons.

Finally, petitioners contend that if ordered to prepare an EIS for West Loch, they will also have to prepare EIS's for all other nuclear capable facilities as a form of smokescreen so that no one will know where they *really* intend to store nuclear weapons, and that the cost of the additional EIS's would be prohibitive.

First of all, as noted above, the preparation of an EIS for West Loch would not establish that a decision has been made to store nuclear weapons there. It would only reveal the unclassified fact that the site is nuclear capable and therefore, that weapons might be stored there at some unspecified time.

Secondly, it is not clear how many such facilities exist and therefore whether the cost would be so great. If, however, an *adequate* EIS were prepared for West Loch, many of the same calculations could be used for other EIS's and only the unique features of the different locations would have to be given fresh examination. This would, of course, substantially reduce the cost of those additional Impact Statements. Cost is, however, no defense to the requirements of NEPA and can certainly not be considered where the safety of the population of Hawaii is at stake.

Most important, however, when the storage of nuclear weapons is contemplated and nuclear capable facilities are being built, the environmental effects *must* be considered not as a smokescreen, but to insure that potentially disastrous decisions are not being made. There is no legal justification for petitioners' failure to prepare an EIS concerning the effects of storing nuclear weapons at West Loch. Given the possible catastrophic results of storage

at that particular facility, the ruling of the court below must be affirmed and the Na y directed to prepare an EIS without further delay.

ARGUMENT

Introduction

The briefs of both the petitioners and the Pacific Legal Foundation seek to treat this case as though it were a mere abstraction, dealing with a large but unstated number of storage sites and no known dangers to the community and/or environment in which they are located. This case, however, concerns one particular, known storage site, conceded by petitioners to be nuclear capable, the location of which poses extraordinary danger to several hundred thousand people living in the most highly populated of the Hawaiian islands. Because of the proximity of the West Loch storage facility to the Honolulu International Airport, a frighteningly real possibility exists of an airplane crashing into the bunkers on any one of the hundreds of takeoffs and landings which occur there every day.[4] In fact, there have been several accidents in which fully armed military planes have crashed into the ocean in the vicinity of West Loch. P-8, Exhs. B1-B6, C1-C6, and D1-D7. One such accident was described as follows

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[4] Because over 99% of all passengers travel to and from Hawaii by airplane, Honolulu International Airport has been described as the state's "principal gateway." In addition, it is the third largest point of entry for international arrivals in the United States. In times of labor disputes involving sea transport, aircraft becomes the sole means of shipping and receiving cargo as well. In addition, Honolulu International Airport serves military as well as civilian aircraft. In 1971, HIA had over 250,000 takeoffs and landings. That number was projected to nearly double by 1985, causing the airport to function over both hourly and annual capacity levels. *Life of the Land* v. *Brinegar*, 485 F.2d 460 (9th Cir. 1973).

by Howard Morland, a pilot who has made close to 1,000 landings at the Honolulu International Airport over the past 12 years:

> The pilot bailed out exactly abeam and one mile distance from the present site of forty eight nuclear weapon storage bunkers at West Loch. With its engine dead and with no one at the flight controls, the airplane glided straight ahead one mile and crashed into Pearl Harbor channel, narrowly missing the residential area at Iroquois Point. A gust of wind, or a quirk of fate, could have turned the pilotless airplane north toward West Loch. Traveling at close to two hundred miles per hour and weighing 22,000 pounds, the disabled fighter plane loaded with rockets and guided missiles would have destroyed any building it hit.

Joint Appendix (hereinafter J.A.), p. 61.

Assuming a plane were to crash into West Loch storage bunkers containing one or more nuclear weapons, the resulting fire could, at the very least, cause a conventional explosion scattering plutonium throughout a one-hundred square mile area.[5] Plutonium is, of course, one of the most toxic substances known; J.A., p. 101. *Natural Resources Defense Council* v. *U.S. Nuclear*

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[5] According to a study done by Lawrence Livermore Laboratory, "the destruction of a bunker containing several nuclear weapons could scatter tiny but measurable amounts of plutonium downwind over a 100 square mile area . . . within that area roughly fifty miles long and two miles wide—the plutonium contamination of the soil would exceed the plutonium screening level recently proposed by the Environmental Protection Agency as safe for human habitation." Even after clean-up operations, "it would be virtually impossible to render a 100-square mile area completely safe by EPA's proposed plutonium screening level." P-66, pp. 274-275.

Regulatory Commission, 547 F.2d 633, 638 (D.C. Cir. 1976), rev'd on other grounds *sub nom*, *Vermont Yankee Nuclear Power Corp.* v. *National Resources Defense Council*, 435 U.S. 519 (1978). Depending on the wind direction, such as accident could therefore not only cause countless cancer deaths, but could render the entire city of Honolulu, as well as large portions of the remainder of the Island of Oahu, uninhabitable.[6]

The accident described above is, moreover, *not* the worst case accident. The worst accident would be a plane crashing into a weapons bunker (or into weapons being moved from the bunker to an awaiting navy vessel) and causing a full-fledged thermo-nuclear explosion. As even the trial court recognized, such an accident would be "catastrophic". J.A., p. 105. Because a thermo-nuclear explosion is less likely to occur, and because of the true horror of the more likely accident, entailing a conventional explosion and dispersal of plutonium, respondents' case does not rest on the possibility of a nuclear explosion actually occurring.

Despite the overwhelming dangers posed by placing nuclear weapons in such close proximity to a major heavily trafficked airport, the Navy has never even considered, much less examined, as it would have to in an EIS, the likelihood and repercussions of airplane crashes into the storage bunkers.

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[6] According to petitioners' CEIS concerning the storage of nuclear weapons, "this material will not cause radiological damage to personnel, regardless of one's proximity, if kept outside the body." Pet. App. G, p. 32a. However, since plutonium in the air enters the body when we breathe, a witness for respondents stated that the statement in the CEIS constitutes "a cruel deception to the public with respect to a very potent carcinogen" because "it is in fact impossible to keep the plutonium 'outside the body' once it is in the air, water and food supply." J.A., p. 39.

Nor has the Navy examined how or whether it could evacuate the affected population in the event of a nuclear accident in light of the fact that the Honolulu International Airport, "the principal gateway" to the island, would be part of, or on the edge of, the accident site. Unless alternate evacuation plans were developed, any person seeking to leave the island because of an accident at West Loch would have to travel through "the hot spot" to do so. Since no EIS has been prepared, however, none of these problems have been considered.

If a nuclear accident were to occur at the proposed storage site, and it were later recognized that these factors had not been considered because of the refusal of the Navy to prepare an EIS, it is difficult to imagine the national reaction except to say that it would no doubt dwarf the reaction of the American public to Three Mile Island.

POINT I

NEITHER THE ATOMIC ENERGY ACT NOR ANY OTHER STATUTE PROHIBITS THE PREPARATION OF THE EIS ORDERED BY THE COURT OF APPEALS.

In Section 102(2)(C) of the National Environmental Policy Act (NEPA), Congress directed that all federal agencies shall, "to the fullest extent possible", include in every recommendation or report on "major federal actions significantly affecting the quality of the human environment" a detailed EIS. Petitioners do not contest that building the nuclear capable West Loch storage bunkers constitutes major federal action which normally triggers the EIS requirements of NEPA. Rather, citing *Flint Ridge Development Co.* v. *Scenic River Assn.*, 426 U.S. 776 (1976), they seek to justify their failure to prepare an EIS by claiming a statutory conflict between NEPA and the Atomic Energy Act, which, they claim

> . . . prohibits the public disclosure of the fact that a specific military facility is a storage site for nuclear weapons, and of information relating to the design, capacity, and vulnerability of the site and the nature of the weapons stored there. Br. Pet., p. 14.

Petitioners then quote portions of the Atomic Energy Act defining information as Restricted Data under the Act and the criminal penalties for divulgence of such data by government employees.

By its frequent citations of the Atomic Energy Act petitioners seek to create the impression that compliance with the order below would require the government to violate that Act. Nothing could be further from the truth. As respondents demonstrate below, compliance with the court's order does not require the government to confirm that nuclear weapons are stored at West Loch or to release a single word of the EIS. However, even assuming *arguendo* that the result of preparing the statement would be to confirm that nuclear weapons are stored at West Loch and that some parts of the EIS must be made public, neither the Atomic Energy Act nor any other statute prohibits such disclosure.

As petitioners point out in their brief, pursuant to the Atomic Energy Act, the Atomic Energy Commission (now the Secretary of the Department of Energy) is mandated to periodically review data defined as Restricted Data to determine whether the specified information no longer requires the special protection of the Act and need no longer be treated as Restricted Data. 42 U.S.C. § 2162. As the classification manuals provided by petitioners demonstrate, the information at issue here concerning whether nuclear weapons are stored at a particular facility (and other information relating to their storage) has been removed from the category of Restricted Data and is now termed Formerly Restricted Data (FRD). See,

Joint ERDA/DOD Nuclear Weapon Classification Guide, Pet. App. H, p. 37a. What is obscured by petitioners' discussion is that, having been removed from the category of Restricted Data, information concerning the presence or absence of nuclear weapons is thus no longer governed by the provisions of the Atomic Energy Act. Therefore, the criminal penalties in the Act cited by petitioners are inapplicable as well, for they only apply to data which *is* restricted. 42 U.S.C. § 2277.[7]

The information in question regarding the storage of nuclear weapons is now governed, as regards public release, exclusively by Executive Order No. 12065, 43 Fed. Reg. 28949 (1978), pursuant to which specified members of the executive branch can designate information top secret, secret, confidential, or unclassified.[8] Thus,

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[7] Of course, some of the data included in the EIS might still be Restricted Data (in the absence of a finding that it is no longer needed to be protected as Restricted Data). As respondents discuss further below, the disclosure of that information could be prevented by placing it in classified annexes to any public portions of the EIS.

[8] The absurdity of petitioners' effort to argue that some other statute requires the information in question to be kept secret is shown by their inability to decide which statute might be relevant (compare the Petition for Certiorari which, on page 15, relies on 18 U.S.C. § 798, with Petitioners' Brief which cites 18 U.S.C. § 793). Section 798 relates to codes, cryptography and communications intelligence, and bears not even a remote relation to this case. Section § 793 is also inapplicable to this case because it punishes only *unauthorized* disclosure to a person not entitled to receive classified information. It has never been interpreted to bar authorized disclosure of information by senior officials whose authority to disclose information is spelled out fully in the Executive Order, E.O. 12065, *supra*, § 1-1. Thus even information presently classified as secret by the Department of Defense could be declassified and placed in public portions of an EIS. Of course, it if were not declassified, it could be kept in the classified annexes.

though information concerning the presence or absence of nuclear weapons may currently be classified, that designation is *not* statutorily mandated and could at any time be changed by executive decision.

Moreover, contrary to petitioners' claim that ". . . the Navy must err, if at all, on the side of non-disclosure. . ." [9] Br. Pet. p. 23, the Executive Order indicates a preference for making information available to the public stating:

> If there is reasonable doubt which designation is appropriate, or whether the information should be classified at all, the less restrictive designation should be used or the information should not be classified.

Executive Order No. 12065, *supra*, Sec. 1-101.

The Executive Order further establishes that "declassification of classified information shall be given emphasis comparable to that accorded classification." *Id.* at 3-301. Most important here, however, the Executive Order states:

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[9] It is, unfortunately, not unusual for the government to attempt to maintain secrecy relying on what the D.C. Circuit has termed "the overused rubric of 'national defense'." *Concerned About Trident* v. *Rumsfeld*, 555 F.2d 817, 823 (D.C. Cir. 1976). Such claims have often been rejected by the courts, *see, e.g., New York Times Co.* v. *United States*, 403 U.S. 713 (1971), or ultimately abandoned by the government itself. *United States* v. *Progressive, Inc.* #79-1428 and #79-1664 (7th Cir.). It is important to note, however, that petitioners have a contiuing obligation under the Atomic Energy Act to reexamine classified material to determine whether it can be declassified, 42 U.S.C. § 2162, and respondents or other persons would be free to challenge those decisions. There are, of course, established mechanisms such as protective orders and security clearances to enable meaningful litigation of these questions even where classified information is involved.

> It is presumed that information which continues to meet the classification requirements in Section 1-3 requires continued protection. *In some cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information*, and in these cases the information should be declassified. (Emphasis added).

Id. at 3-303.

Thus, when petitioners argue that they cannot prepare an EIS because they are prohibited by statute from discussing a specific nuclear weapons storage site, they are *doubly in error* since the statute in question no longer governs the relevant information, and the Executive Order which does, expressly states that the public interest can be determined to outweigh the needs of secrecy.[10]

As the respondents demonstrate more fully below, petitioners' attempt to rely on the Atomic Energy Act to avoid compliance with NEPA fails for an additional reason: it is not, in fact, necessary to confirm or deny the presence of nuclear weapons in order to prepare an EIS for West Loch.

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[10] Furthermore, as the Court of Appeals pointed out in *Concerned About Trident* v. *Rumsfeld*, *supra*, in December, 1970, the Navy issued the first of a series of instructions implementing NEPA provisions. As the Court stated, "By issuing such directions the Department of Defense—Navy bound itself to comply with the substance of the Act." (citations omitted) 555 F.2d at 824.

POINT II

PREPARING AN ENVIRONMENTAL IMPACT STATEMENT CONCERNING STORAGE OF NUCLEAR WEAPONS AT WEST LOCH WOULD NEITHER DIVULGE MILITARY SECRETS NOR HARM NATIONAL SECURITY.

Having eliminated the Atomic Energy Act as an obstacle to the preparation of an EIS for West Loch, there remain petitioners' contentions that Joint ERDA/DOD Nuclear Weapon Classification Guides barring disclosure of the presence of nuclear weapons preclude an EIS, and that preparation of an EIS would result in divulging other military secrets. In fact, neither contention justifies the failure of the Navy to prepare an EIS.

A. It is Not Necessary To Confirm The Presence Of Nuclear Weapons In Order To Prepare An EIS for West Loch.

Since an EIS should be prepared *prior to* a final decision concerning the major federal action (here the storage of weapons), compliance with the order of the Court below would not confirm the presence of nuclear weapons at West Loch and thus would not violate the Joint ERDA/DOD Nuclear Weapon Classification Guide curbing acknowledgment of actual storage of weapons. The only fact that would be revealed by preparing an EIS is whether the storage facility were nuclear capable. That, of course, has been admitted by petitioners in this case, J.A. p. 18, and, according to the Classification Guide, is *not* classified information. Pet. App. H., p. 37a, # 1721. Thus preparation of an EIS would not reveal any information not already public and could not injure national security.

As the Court below correctly pointed out, when storage bunkers are nuclear capable,

> The public . . . must assume that at least the possibility exists that nuclear weapons, to the extent of the apparent capacity of the facility (assuming that capacity would be apparent to a knowledgeable observer) will be stored at West Loch. Thus, an EIS dealing with the consequences of such possibility would reveal nothing with respect to the likelihood of storage of which the public is not already aware. Such a process of informing the decision maker need not imply that the decision has already been made or what the decision is; the Secretary need never reveal the fact that a decision has been made or what it is. However, the public must receive some assurance, particularly on a situation as potentially catastrophic as this one, that when the decision is made the decision maker will have been adequately informed as to the environmental consequences of each alternative, here including the potential consequences of the storage of nuclear weapons at this particular site.[11]

Pet. App. A., p. 5a.

Of course, the purpose of the EIS is not to establish that weapons are or will be present but rather to determine what consequences might flow *if they were.*

Even if the EIS were prepared after the fact because of lack of timely compliance, as here, it would *not* be

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[11] Similarly, should an airport contemplate building a runway large enough to accomodate jumbo jets, even before a decision is made to permit the landing of those oversize jets, an EIS must be prepared examining, among other things, the potential environmental consequences of actually having the jumbo jets use the runway.

necessary for petitioners to state whether or not the weapons have in fact been placed in the completed bunkers, but merely the possible consequences if they were there.

To the extent described above, the EIS would be examining "hypothetical" consequences of a proposed action. But in so doing, it would be no different from other Environmental Impact Statements which examine the consequences of proposed actions; such proposed actions and their consequences by definition are "hypothetical". There is surely no theoretical distinction between an EIS which asks "What would be the possible environmental consequences if a freeway exchange were built in a particular location?", as in *City of Davis* v. *Coleman*, 521 F.2d 661 (9th Cir. 1975), and another which asks "What would be the possible environmental consequences if nuclear capable storage bunkers were built in a particular location?" Petitioners seek to suggest that the EIS mandated by the Court below is some new species of EIS not envisioned by NEPA. Since all EIS's deal with "hypothetical" proposed actions and their consequences, the EIS mandated by the Ninth Circuit in this case is no different from what petitioners term a "standard EIS". Br. Pet., p. 24.

B. Neither The Court Below Nor Respondents Have Asserted That The Entire EIS Must Be Public.

Petitioners' repeated contention that classified military information would be revealed if they were to prepare an EIS in compliance with NEPA, is based, in part, on the erroneous contention that the decision of the court below requires that the entire EIS be available to the public. At no time during this litigation have respondents asserted that the entire EIS must be available to the public. Only those portions which are unclassified would be publicly available. It is abundantly clear that DOD regulations themselves contemplate the preparation of EIS's which include both public portions and classified annexes which are not available to the public. 32 C.F.R. § 214.6(D)

(10).[12] Nonetheless, petitioners repeatedly pose the question at issue here *as though* compliance with the mandates of NEPA and the opinion of the Ninth Circuit required that the *entire* EIS be public. That is plainly not the case. The cases cited by petitioners for the principle that the interests of secrecy can, in some circumstances, outweigh the adversary process are therefore irrelevant to this case.[13]

C. There Is A Substantial Body Of Relevant Unclassified Information Which Would Permit Significant Portions Of The EIS To Be Made Publicly Available And Which Must Be Addressed In Order To Comply With NEPA.

Petitioners have also argued that

> . . . The publicly available portion of a partially classified hypothetical EIS undoubtedly would, in most instances and respects, be incomprehensible, or would be so abstract, general and incomplete as to be of no appreciable benefit to Congress, sister agencies, or the general public.

Br. Pet. p. 23.

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[12] That regulation, cited previously by both petitioners and respondents as 32 C.F.R. 214.8(i), states in pertinent part:

> When feasible, environmental documents may be organized in such a manner that classified portions can be included as annexes, so that unclassified portions can be made available to the public in the normal manner.
>
> DOD Reg., 32 C.F.R. 214.6(D)(10)

Although there have been minor changes in wording in the DOD regulation, those changes have no bearing on respondents' arguments herein.

[13] See, petitioners' reliance on *Hayden* v. *National Security Agency/Central Security Service*, 608 F.2d 1381, 1385 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 937 (1980); *United States* v. *Reynolds*, 345 U.S. 1 (1953); *Totten* v. *United States*, 92 U.S. 105 (1875).

In fact, however, several of the questions which the Court below said the Navy must examine in an EIS and which go to the heart of determining the likelihood of an accident resulting in the dispersal of deadly plutonium, can be addressed on the basis of virtually all unclassified information which is totally independent of classified information.

On the basis of unclassified data, an EIS could examine the likelihood of an airplane crashing into the West Loch bunkers on takeoff or landing. Although it seems incredible that this question would not be examined prior to a decision to store nuclear weapons in the shadow of a major heavily trafficked international airport, it has not been. An "accident potential zone" [14] can be calculated for the Honolulu International Airport, and in fact such a calculation has been proposed by both the state of Hawaii and airport officials but has never officially been done. Preparation of an accident potential zone is particularly important because a substantial percent of airplane accidents occur during takeoff and landing.[15]

Such an accident potential zone was calculated for the Honolulu International Airport by a witness for respondents, extrapolating from official calculations for such a zone for a neighboring airport. According to his calculations, the West Loch bunkers are within the area of high vulnerability to airplane accidents. Tr. pp. 27.

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[14] An accident potential zone is "a rough measure of the risk that an airplane will crash on a piece of ground." Transcript of Proceedings, March 5, 1979, hereinafter, Tr. p. 27.

[15] According to the National Transportation Safety Board, in 1972-76, takeoffs and landings accounted for 32% of all airplane accidents and *60% of all fatal accidents.* National Transportation Safety Board, Annual Review of Aircraft Accident Data, 1976, J.A. p. 71.

Even petitioners' own classification expert indicated at trial that many facts bearing directly on the key issue of risk, which is central to this litigation, are not classified. For example, the numbers or locations of airplane accidents in Hawaii (information essential to the calculation of an accident potential zone) are not classified. J.A., p. 22. The classification expert indicated that information concerning what would happen to a plane when it hit the ground, J.A., p. 25, the number of nuclear accidents, J.A., p. 22-3, the fact of a nuclear accident, Tr. pp. 216, 223, and factors concerning the dispersal of plutonium, J.A., p. 24,[16] all involve unclassified information which is independent of classified information.

Although petitioners err by repeatedly formulating this case as though it both assumes and requires that the *entire* West Loch EIS be public, the principle of maintaining all feasible public involvement must not be overlooked. For without open examination of these and other unclassified matters, members of the public will be deprived of the basic information they need to make critical decisions concerning their own safety and security and to be an informed electorate.

For example, persons who are now living in or contemplating moving to the fast growing Pearl Harbor area,

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[16] Lest petitioners claim that this could not be done without divulging secrets regarding the design of nuclear weapons, we need only point out that it is common knowledge, and even the Navy's own CEIS implies, that most nuclear weapons contain plutonium. *See* Pet. App. G, p. 32a. It is further common knowledge within the scientific community that a minimum of 300 grams of plutonium is necessary to trigger the weapon. Tr. p. 10. Therefore, at the very least, petitioners could continue the explorations begun by Lawrence Livermore Laboratory to determine the effects of an accident in which a conventional explosion or fire resulted in a dispersal of at least 300 grams of plutonium.

where West Loch is located, might wish to reconsider these plans if an EIS determined that there was a significant probability of an airplane crashing into one of West Loch's nuclear capable bunkers. Understandably, they might not wish to live and raise a family where there is a real possibility of a serious nuclear accident.

That same information would also be important to decision makers on a state and local level who might conclude they must accelerate plans to build a general aviation airport in order to decrease traffic in and out of Honolulu International Airport and therefore, hopefully, decrease the possibility of a nuclear accident.

Finally, public examination of those questions is essential in order to fulfill the goals of the EIS requirements of NEPA, "to provide the public with information on the environmental impact of a proposed project as well as encourage public participation in the development of that information." *Trout Unlimited* v. *Morton*, 509 F.2d 1276, 1282 (9th Cir. 1974); *City of Davis* v. *Coleman*, 521 F.2d 661 (9th Cir. 1975).

For as the Court below noted:

> While courts are reluctant to second-guess an informed decision maker as to what is or is not in the public interest, an informed electorate need not be reluctant. For this reason, it seems to us to be important that the public be informed where, as here, disclosure can be so conditioned as not to impinge on the national security. Otherwise, agencies would be able to escape the consequences of the political process as it may operate on an unpopular decision by concealing from the public

the fact that such a decision has been or may be made.[17] Pet. App. A. pp. 6a-7a.

D. Even If The West Loch EIS Had To Be Kept Entirely Classified, NEPA Requires That The EIS Be Prepared And Taken Into Account In Making Any Decision To Store Nuclear Weapons At West Loch.

In addition to the purposes discussed above, the EIS requirements of NEPA are also designed to insure that decision makers have full knowledge of the environmental consequences before making a final determination whether to proceed with a project. As the Court stated in *Trout Unlimited* v. *Morton, supra*, the EIS ". . . should provide decision makers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in light of its environmental consequences." 509 F.2d at 1282.

Thus, even were it necessary for the *entire* EIS to be *classified*, and therefore not available to the public, an EIS must nevertheless be prepared assessing the environmental effects of storing nuclear weapons at West Loch. In fact, petitioners' own regulations expressly recognize that principle. In subsection 10 of Section D. Environmental Impact Statement Phase, the regulations specifically refer to situations ". . . when the proposal itself

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[17] Should petitioners respond that public participation in any decision making concerning the placement of nuclear weapons is somehow inappropriate, one need only look to the considerable public participation in decisions concerning the existence and location of the MX missile system and the ultimate rights of the electorate to remove from office those persons who it believes have placed weapons in locations which are contrary to the public interest.

is classified." 32 CFR 214.6(D)(10). Petitioners seek to wish away this regulation by arguing that:

> . . . the crucial question is not whether the Navy must or will comply with NEPA insofar as that statute compels *decisionmakers* to take specified steps to inform themselves of, and take into account, the environmental consequences of the actions they propose. Br. Pet. p. 13.

That, however, is *exactly* the issue in this case. For as the Court below stated: ". . . the decision maker must be so informed as to the consequences of each alternative that a knowledgeable choice can be made." Pet. App. A. pp. 4a-5a; see also, *Trout Unlimited* v. *Morton, supra.* Here, the frightening fact is that although the West Loch bunkers are nuclear capable, and although they were built to house weapons from Waikele (which even respondents knew were nuclear weapons), the decision maker *has not* examined how dangerous it would be to store nuclear weapons at West Loch. Rather, the Navy has prepared an Environmental Impact Assessment (EIA) and a "Candidate" Environmental Impact Statement (CEIS), neither of which examines the questions necessary to inform a decision maker concerning the dangers of storing nuclear weapons at West Loch. The EIA indicates conventional weapons have previously been stored at West Loch. It never mentions nuclear weapons, however, or the special dangers, such as radiation, which they involve. Pet. App. F, pp. 17a-26a. The CEIS states that:

> A rupture of the nuclear warhead [resulting in the release of radioactive material] is extremely unlikely since the warhead is designed to withstand considerable impact. Tests had (sic) confirmed that warheads will remain intact when dropped from heights much greater than those normally experienced in actual handling operations.

And that although

> . . . in the event of a high explosure (sic) detonation, some plutonium material could be spread about the immediate area of the accident, this material will not cause radiological damage to personnel, regardless of one's proximity, if kept outside the body.

CEIS, Pet. App. G, p. 32a.

It does not, however, even examine a nuclear warhead would rupture and plutonium disperse as a result of an airplane crash (as occurred in Palomares, Spain and Thule, Greenland)[18] or just how residents of Hawaii would keep plutonium out of their bodies since it is taken into the body by breathing. *See*, footnote 6, p. 12, *supra*. Moreover, plutonium is so toxic that ". . . inhalation of a single microscopic particle is though to be sufficient to cause cancer." *Natural Resources Defense Council* v. *U.S. Nuclear Regulatory Commission*, *supra*, 547 F.2d at 638; see also, J.A. p. 34.

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[18] When a B-52 and a KC-135 collided over Palomares, Spain, two of the four nuclear weapons carried by the B-52 exploded on impact with the ground, releasing radioactive materials. Approximately 1,400 tons of radioactive soil and vegetation were removed for storage in the United States. In 1968, a B-52 crashed and burned approximately seven miles from a runway while approaching the Thule Air Force Base to land. All four nuclear weapons on board were destroyed by fire, which resulted in contamination of sea ice. "Some 237,000 cubic feet of contaminated ice, snow and water, with crash debris, were removed to an approved storage site in the United States over the course of a four-month operation." *Narrative Summaries of Accidents Involving U.S. Nuclear Weapons, 1950-1980*, 15 May 1981, Dept. of Defense. In addition to those accidents, in 1950 a B-29 carrying a weapon crashed during takeoff from what is now Travis Air Force Base in California. The fire from the burning plane was fought for 12 to 15 minutes before the weapon's high explosive material detonated. (*ibid*).

Thus, obviously the decision maker here has never been adequately informed to make a knowledgeable and therefore rational determination whether nuclear weapons can be *safely* stored at West Loch. That, of course, is one of the fundamental purposes of an EIS.

POINT III

THE COST OF PREPARING EIS's FOR CITES OTHER THAN WEST LOCH DOES NOT JUSTIFY FAILURE TO COMPLY WITH NEPA.

In a last ditch effort to avoid preparing an EIS for the concededly nuclear capable bunkers at West Loch, both petitioners and the Pacific Legal Foundation argue that were a West Loch EIS prepared, smokescreen EIS's would also have to be prepared for every other nuclear capable storage site, at the cost of millions of dollars.

For they claim,

> ". . . if hypothetical EIS's were prepared and disseminated only for those facilities where nuclear weapons in fact are stored, the EIS would serve as a kind of paper signpost advertising the site's existence and purpose." [19] Br. Pet. p. 24.

As respondents pointed out above, however, the preparation of an EIS need not, and should not, signify that nuclear weapons are present at a particular location, since it should be prepared prior to the final decision con-

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[19] Petitioners go on to argue that ". . . EIS's would have to be prepared not only for facilities actually capable of storing nuclear weapons, but for facilities perceived to have that capability as well . . . ." Br. Pet., p. 24. In so arguing, they are doubtless forgetting that the fact that a facility is nuclear capable is not classified information and therefore already publicly available information. See discussion, p. 18, *supra*.

cerning storage. See, point IIA, pp. 18-20, *supra*. If an EIS must be done for West Loch, it is not because nuclear weapons "in fact are stored" there, but because the facility is nuclear capable and the weapons might one day be stored there. If EIS's must be done for other nuclear capable facilities, they must be done not as smoke-screens for a West Loch EIS, but to inform decision makers (and, to the extent possible, the public) whether or not nuclear weapons can be safely stored in those other nuclear capable locations.[20]

It must be noted, moreover, that nowhere in the record is there any indication of how many nuclear capable storage sites exists.[21] Therefore, there is no basis to assume that the cost of preparing EIS's for all nuclear capable storage sites, which would involve many of the same calculations, would even be burdensome, let alone prohibitive.

It must also be noted that since whether a storage site is nuclear capable is *not* classified information, the *number of nuclear capable facilities* could be made public.

Storing nuclear weapons in locations which are unusually danger prone, and which have particularly high population density, such as the West Loch area, without fully examining the environmental consequences is, at best, highly irresponsible. As respondents have noted above, if Americans are to live without the constant danger and concomitant fear of cataclysmic accidents in their own backyards, such EIS's must be done. The cost

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[20] This, of course, assumes that each of those other storage sites, like West Loch, constitutes "major federal action" since the EIS provisions of NEPA are triggered by "major federal action."

[21] Because the financial argument was first raised by petitioners in this Court, that information was never sought by respondents in discovery or otherwise made part of the record herein.

of such an undertaking could, however, be substantially reduced if an adequate "candidate" or generic EIS were prepared rather than the totally inadequate one that exists now.[22] Then, the EIS for any specific location would only need to explore the unique features of that location.

However, even assuming there will be some cost of impact statements necessary to protect the safety of our people and environment, those costs are not a defense to the requirements of NEPA. Moreover, respondents and Pacific Legal Foundation would surely rather have that money spent now on studies which could prevent tragic accidents from occurring rather than paying later for the removal of contaminated land and for compensation to the people of Hawaii for their illnesses and deaths.

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[22] An adequate generic EIS could fully examine the hazards common to all nuclear weapons storage such as dispersal of plutonium resulting from a fire. It could also consider special, though not unique, hazards such as storage near airports, earthquake faults, nuclear reactors, large population centers, etc. The generic statement could, for example, consider the minimum safe distance between nuclear storage facilities and airports of various sizes and traffic densities, and examine what would occur if a plane crashed into a bunker containing nuclear weapons or weapons being transferred into a vehicle. This would leave to the site-specific EIS questions as to local wind patterns, possible escape routes in case of accident, etc. A West Loch EIS, for example, must examine whether evacuation of the island of Oahu would be possible in the event of a nuclear accident.

CONCLUSION

For all the foregoing reasons, respondents urge this Court to affirm the ruling of the Court below and direct the Navy to prepare an Environmental Impact Statement for West Loch without further delay.

Respectfully submitted,

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No. 80-1377

In the Supreme Court of the United States

OCTOBER TERM, 1980

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

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1. The simple thrust and narrow dimensions of petitioners' position must not be lost in the welter of arguments surrounding it:

a. Whether or not nuclear weapons are stored at any specific site is a military secret. The Atomic Energy Act of 1946, as amended, requires that information which relates primarily to the military utilization of atomic weapons be "safeguarded as defense information" (42 U.S.C. 2162(d));

b. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332 *et seq.*, does not require the disclosure of military secrets. First, NEPA, 42 U.S.C. 4332(2)(C), declares (through its incorporation by reference of the Freedom of Information Act, 5 U.S.C. 552(b)(1)(A)), that the public dissemination of an environmental impact document is not required where it involves matters which must

be "kept secret in the interest of national defense or foreign policy * * *." Second, "NEPA was not intended to repeal by implication any other statute," and "where a clear and unavoidable conflict in statutory authority exists, NEPA must give way," *Flint Ridge Development Co.* v. *Scenic Rivers Association*, 426 U.S. 776, 788 (1976);

c. Since public knowledge that an environmental impact document had been, or was intended to be, prepared for the storage of nuclear weapons at any specific site would necessarily reveal the military secret that nuclear weapons are, or are planned to be, stored at that site, there may be no public disclosure of compliance (or even noncompliance) with NEPA with respect to the storage of nuclear weapons at any specific site; and

d. Whether nuclear weapons are stored at West Loch cannot be revealed. If they are stored there, however, an appropriate environmental impact document has been prepared, as required by NEPA and Department of Defense regulations.

2. Respondents contend (at 14 and 15 of their brief) that the Atomic Energy Act is not involved in this case, since the pertinent secret data are not Restricted Data, but are now Formerly Restricted Data. Formerly Restricted Data are defined by the Atomic Energy Act as "such data as the Commission and the Department of Defense jointly determine relates primarily to the military utilization of atomic weapons and which the Commission and Department of Defense jointly determine can be adequately safeguarded as defense information." 42 U.S.C. 2162(d). Data are designated as Formerly Restricted not to divest the Atomic Energy Commission of its jurisdiction over information relating primarily to the military utilization of atomic weapons, but to confer upon the Department of Defense responsibilities equal to those of the Commission with respect to the protection of such data. See 42 U.S.C.

2162(c). There is no reason to suppose, therefore, that Restricted Data relating to the military utilization of atomic weapons are less protected than Restricted Data having no military application.

Moreover, the Atomic Energy Act expressly states that "no such data so removed from the Restricted Data category [i.e., Formerly Restricted Data] shall be transmitted or otherwise made available to any nation or regional defense organization, *while such data remains defense information* [emphasis supplied], except pursuant to an agreement for co-operation entered into in accordance with section 2164(b) of this title." 42 U.S.C. 2162(d). Formerly Restricted Data, therefore, so *long as they remain defense information—i.e.*, until the Atomic Energy Commission and the Department of Defense *jointly determine* that they may be published without "unreasonable risk to the common defense and security" (42 U.S.C. 2162(c))—can only under certain conditions be made available to our allies. Obviously, the limitation on the disclosure of Formerly Restricted Data to allied nations, to be meaningful, must necessarily embrace a similar limitation on the disclosure of Formerly Restricted Data to anyone with the standing to bring a NEPA suit.[1] Thus, contrary to the assertion of the respondents, Formerly Restricted Data remain within the purview and protection of the Atomic Energy Act.

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[1] As explained by Mr. Murray L. Nash, Deputy Director, Office of Classification, Department of Energy (J.A. 27):

> Formerly restricted data is a rather oddball name. It refers to restricted data which the Department of Energy, formerly the Atomic Energy Commission and the Department of Defense have both jointly determined can be adequately protected as national security information when that information is in the United States. But it reverts to the former restricted data categorization if it is transferred outside the United States, say to NATO or in a national organization that we deal with. But it is really restricted data.

3. Respondents contend (at 13 and 14 of their brief) that neither the Atomic Energy Act nor any other statute prohibits the *preparation* of an an appropriate environmental impact document, and that even if that document must be kept entirely classified, NEPA requires that it be prepared (Resp. Br. 25). On these points, there is no dispute: in our initial brief (at 12 and 13), we cite Department of Defense regulations requiring compliance with NEPA for classified activities,[2] and acknowledge that the "statute compels *decisionmakers* to take specified steps to inform themselves of, and take into account, the environmental consequences of the actions they propose."

The requirement that an environmental impact document be *prepared* for a secret activity does not mean, however, that the existence of the document may be disclosed, or its contents disseminated. An EIS (or Environment Impact Assessment) about a secret activity necessarily is at

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[2]The regulation cited in our opening brief (at 12-13), 32 C.F.R. 214.8(i) (1978), was in effect at all times relevant to this case. We should note, however, that this part of the Code of Federal Regulations was substantially amended on July 30, 1979, 44 Fed. Reg. 46841 and a regulation of that number, and with the same text, no longer exists. The rule nevertheless remains the same. Indeed, the amended regulations clearly follow the principle that an EIS must be prepared for *all* actions significantly affecting the quality of the human environment (para. B.5 of DOD Implementing Procedures, as set forth in 32 C.F.R. 214.6), and that an environmental impact assessment (EIA) must be prepared unless it is clear, at the outset, that no such impact is involved (*id.* at paras. B.4, B.6, C.1-3). That the obligation to consider environmental factors and prepare an appropriate document applies regardless of the classified nature of the action or information, is made clear by the provisions dispensing with public participation when that is not "practicable" because of "national security classification issues" (*id.* at para. C.3) and exempting "classified environmental documents" from the requirements for "circulation" and "public involvement", except when segregation of unclassified materials is "feasible"—a procedure "normally * * * not possible when the proposal itself is classified" (*id.* at para. D.10).

least as secret as the activity itself. In *Totten* v. *United States*, 92 U.S. 105, 107 (1875), this Court went so far as to hold that since a lawsuit with respect to a secret contract would "inevitably lead to the disclosure of matters which the law itself regards as confidential," the suit itself may not be maintained.[3] Similarly here, since public participation in the NEPA process would inevitably lead to the disclosure of matters which the Atomic Energy Act (as well as the common law—see 8 J. Wigmore, *Evidence* § 2378 (McNaughton rev. ed. 1961)) requires to be kept confidential, such participation may not be permitted.

The respondents suggest that this difficulty can be overcome by disclosing something less than the entire EIS or other environmental document. They state (at 23 of their brief) that there can be an "open examination of * * * *unclassified matters*" (emphasis supplied) as a result of which members of the public will have "the basic information they need to make critical decisions concerning their own safety and security and to be an informed electorate." An example of such a decision (set forth at Resp. Br. 23, 24) is that "persons who are now living in or contemplating moving to the fast growing Pearl Harbor area, where West Loch is located, might wish to reconsider these plans if an EIS determined that there was a significant probability of an airplane crashing into one of West Loch's nuclear capable bunkers."

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[3]The Court of Claims has recently dismissed two cases on the basis of the *Totten* decision: *Simrick* v. *United States*, petition dismissed, No. 45-80C (June 27, 1980), and *Mackowski* v. *United States*, petition dismissed, No. 605-80C (June 12, 1981). The orders dismissing the cases are not yet reported, but a copy of each order is attached hereto.

But what the respondents do not explain is how the members of the public would be aided in making such decisions[4] by an EIS or EIA which does not—which cannot, if it contains only unclassified matters—disclose whether or not nuclear weapons are being stored at West Loch. And respondents' many arguments, in spite of their occasional deference to the concept of an EIS containing only unclassified matter, are meaningful only if seen to be premised upon the assumption that the EIS they are seeking will definitely reveal whether or not nuclear weapons are being stored at West Loch (see Resp. Br. 22, 23, 26, 28 and 30 n.22). Yet this, of course, is the very *essence* of the supposed military secret. The bare fact that nuclear weapons are stored at diverse places in the United States obviously is no secret to anyone: *where* those weapons are being stored, however, is a secret; it is the secret here sought to be protected, and the secret which necessarily would be disclosed if the appellants prevail.[5]

4. Respondents reply (at 18 of their brief) that since the Department of Defense has admitted that the West Loch facility is capable of storing nuclear weapons, an EIS relating to that storage "would not reveal any information not already public and could not injure national security."

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[4]Moreover, it cannot be ignored that many of the members of the public living in the Pearl Harbor area are there because of, not in spite of, the military installations.

[5]To be sure, examples can be cited where EIS's have been prepared for defense activities only a few elements of which were secret, and where it was possible to separate the secret from the non-secret aspects of the operation. But that is not possible here, where merely to identify the location where nuclear weapons are being stored is to reveal the secret.

However, the admission that a military base is "nuclear capable" is essentially an admission of nothing, since common sense informs the world at large that every fenced military installation might be a place where weapons, nuclear or otherwise, are being stored. To say that a specific installation is capable of storing nuclear weapons is no more informative, and no more indicative of an intention to use the facility for weapon storage purposes, than to say that any particular piece of land is capable of having an eight-lane highway constructed over it; there remains the question whether the appropriate authorities intend to build such a highway. No one would think of requiring the federal government to prepare EIS's for all the highways in the country which are capable of being constructed, but which no one has any intention to build; similarly, the government ought not be required to prepare EIS's for all the facilities in the United States which are capable of storing nuclear weapons, but where no one has any intention of storing them. In *Kleppe* v. *Sierra Club*, 427 U.S. 390, 401, 402-403 (n.14) (1976), addressing a similar contention that an EIS should be prepared for a federal activity not being contemplated, this Court held that NEPA "requires an impact statement only in the event of a proposed action * * *," pointing out that it is only with respect to a specific proposed action (which in this case would mean the storage of a specific quantity of nuclear weapons having specific operating mechanisms and specific capabilities) that "the bounds of the analysis are defined * * *."

The government ought not be compelled to prepare an EIS for hundreds of facilities where the storage of nuclear weapons is not contemplated—a burden not imposed by law and misleading to the public. Nor should it be driven to that expedient in order to preserve, from domestic terrorists and hostile foreign powers alike, the secret as to where the

weapons are actually stored.[6] In sum NEPA does not require the preparation of EIS's for activities which are *not* being contemplated, and the Atomic Energy Act does not permit public participation in the preparation of EIS's relating to secret activities (within the purview of the Act, of course) which *are* being contemplated.

5. Respondents throughout their brief make a number of supposedly factual statements, the truth of which they cannot possibly know. Thus, they state that the petitioners have failed to consider certain questions "essential to any decision to store nuclear weapons at West Loch" (Resp. Br. 5) and that petitioners "have never prepared an Environmental Impact Statement (EIS) which would examine, among other things, the likelihood of an airplane crashing into the storage bunkers and the resulting injury to people and damage to the environment if such an accident did occur" (*id.* at 6, 28). Since government officials have never indicated whether or not nuclear weapons are stored at West Loch—and thus have necessarily been silent on the question whether an EIS was prepared prior to the storage of any nuclear weapons at West Loch (if in fact any are stored

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[6]This is why the "hypothetical EIS" directed to be prepared by the court of appeals is not a solution to the problem of reconciling the secrecy requirements of the Atomic Energy Act with the public disclosure provisions of NEPA, for, obviously, the preparation even of hypothetical EIS's only for those facilities where the storage of nuclear weapons is under serious consideration would facilitate the ascertainment by interested persons of the location of storage sites.

Already, on the basis of the court of appeals' decision in the instant case, a suit has been filed in the district court for the Central District of California, to enjoin officials of the Defense Department from "transporting, importing, maintaining, storing and handling nuclear weapons at the Seal Beach Naval Weapons Station until they have complied with the requirement of the National Environmental Policy Act * * *." *Laine* v. *Weinberger*, No. 81-3969 (filed Aug. 6, 1981).

there)—there simply is no basis in the record of any of the foregoing statements.

Respondents also persist in the allegation (at 10 of their brief) that "[b]ecause of the proximity of the West Loch storage facility to the Honolulu, International Airport, a frighteningly real possibility exists of an airplane crashing into the bunkers on any one of the hundreds of takeoffs and landings which occur there every day."

The district court found that the West Loch storage facility is "approximately one mile from the landing flight path" for the airport, and that "the Federal Aviation Administration has not established a prohibited flight zone over this area" (Pet. App. 13a). The respondents' emphasis on the spectre of an airplane crash into West Loch demonstrates the virtually unlimited extent of possibilities into which the creative mind may suggest that an environmental statement must inquire. The one mile distance means that aircraft come about as close to West Loch as aircraft using National Airport come to the Supreme Court Building.

Moreover, this concern, and the others raised by respondents, relate to safety. Yet the federal action at issue here is not the creation of new weapons storage where none existed previously. It is the transfer of weapons storage from one site to another, and the Environmental Impact Assessment found that safety considerations were among those that "offset the adverse environmental effects" (Pet. App. 26a).

6. A contention made, not by respondents, but by the Fellowship of Reconciliation and other amici in support of the respondents, is that what the government claims to be a military secret is in fact generally well-known, both to the American public and to potential enemies, and that there is accordingly no reason not to prepare and publish an EIS (at 27 through 43 of the amicus brief). Appended to the amicus brief (at 1a) is an excerpt from Publication No. 7 of

National Action/Research on the Military Industrial Complex, showing on a map of the United States the location of 121 alleged "Nuclear Weapons Storage and Development Sites."

It may well be that many or most of the installations identified are *capable* of storing nuclear weapons; it does not follow that such storage is a present fact or now planned. Moreover, even if some secrets are out of the bag, that is no reason to empty the bag entirely, for all to see.

In any event, as the excerpt submitted by the amici expressly acknowledges (Fellowship of Reconciliation Amici Br. App. at 2a),

> U.S. military policy prohibits either confirming or denying the presence of nuclear weapons. The shroud of secrecy surrounding the testing, production and storage of nuclear weapons makes it difficult to verify the location of all sites.

Thus, the very materials submitted by the amici show that the military's "shroud of secrecy" has some effect in safeguarding the country's military secrets. It cannot be supposed that NEPA was designed to permit the revelation of those secrets, and that Congress with one hand is piercing that which with the other hand it shields.

7. Respondents contend (at 15 and 16 of their brief) that information which is classified pursuant to Exec. Order No. 12065, 43 Fed. Reg. 28949 (1978), can be declassified and placed in public portions of an EIS. This is true,[7] but irrelevant; the Department of Defense has seen fit not to declassify information with respect to the location of storage sites for nuclear weapons.

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[7]Strictly speaking, the secret information in this case, being Formerly Restricted Data, is not protected *only* by Exec. Order No. 12065 (see pages 2 and 3, *supra*). Formerly Restricted Data remain subject to the provisions of the Atomic Energy Act, and can be published only upon a

This brings us, then, to what this suit is essentially about: whether it shall be government officials acting pursuant to congressional legislation, or environmentally concerned citizens, who shall make the final determination as to what information may, or may not, upon disclosure, jeopardize the national defense. For although "in some cases, * * * the need to protect such information may be outweighed by the public interest in disclosure of the information" (Resp. Br. 17), it is equally true that "even the most compelling necessity cannot overcome the claim of privilege [from disclosing military secrets] if the court is ultimately satisfied that military secrets are at stake." *United States* v. *Reynolds*, 345 U.S. 1, 11 (1953). Here, there can be no question that military secrets are at stake; information with respect to the military utilization of nuclear weapons has been statutorily defined as information which is to be kept secret and accorded all of the protection which our laws allow.

This case is an attempt to force the public disclosure of information concerning the storage of nuclear weapons at West Loch. Since the storage or non-storage of nuclear weapons at any particular site is a military secret, the attempt to obtain that information creates a tension between the general disclosure policy of NEPA and the secrecy policy of the Atomic Energy Act. As explained above, both Congress and this Court have made it clear that any such tension is to be resolved in favor of secrecy.

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determination by the Atomic Energy Commission and the Department of Defense that such publication does not constitute an unreasonable risk to the common defense and security. 42 U.S.C. 2162(c). We assume, however, that the respondents would argue that these agencies, or the President, should declassify the material, whatever might be the authority for that declassification, and thus we do not make a point of this in the context of the instant argument.

Whether there are, as respondents and amici suggest, additional finite pieces of information that could be safely disclosed is beside the point. The general subject concerning which the respondents seek more ample public knowledge—the storage of nuclear weapons at a specific site—is one which Congress has determined should remain within the realm of the secret. This Court's decisions in *Reynolds* and *Totten* provide a margin of safety for the protection of government secrets. Indeed, *Totten* appears to stand for the proposition that courts should not even entertain lawsuits which have the potential of inquiring into general areas involving government secrets.

Fortunately, however, this case need not be resolved on the basis of a general *Totten*-type protection. The NEPA issue in this case is this simple: If there is no nuclear storage at West Loch, then the fears posited by the respondents are groundless. If, on the other hand, West Loch is, or is to be a nuclear storage facility, then consistent with Defense Department regulations, the environmental consequences have been brought to the decision makers' attention, and taken into account by them. NEPA requires no more. Thus, the only possible missing element is disclosure to the general public. And that is the very kind of disclosure that is prohibited by NEPA, by the Atomic Energy Act, and by this Court's decisions.

In the final analysis, the respondents ask for little more, and the difference between their position and that of petitioners would appear to be a narrow one. The respondents assume that the action of storing nuclear weapons necessarily requires the preparation of an EIS (as, indeed, the district court held (Conclusion of Law No. 4, App. D, Pet. App. 14a)), and argue that "[e]ven if the West Loch EIS had to be kept entirely classified, NEPA requires that the EIS be prepared and taken into account in making any decision to store nuclear weapons at West Loch" (Resp. Br. 25). To the

extent that a full-blown EIS might be required in any given case, we accept this proposition. However, NEPA does not compel the preparation of an EIS for *every* federal action. The regulations of the Council on Environmental Quality recognize that, in appropriate situations, documents other than environmental impact statements may be prepared, and that their preparation fully satisfies the requirements of NEPA. 40 C.F.R. 1501.3, 1508.9. Thus, while we do not agree with the respondents (or with the courts below) that an environmental impact statement is the only type of document which can satisfy the requirements of NEPA in a case involving the storage of nuclear weapons, we do agree that an appropriate document—be it an environmental assessment or an environmental impact statement—must and will be prepared for the use of those within the Department of Defense who make decisions relating to the storage of nuclear weapons. The disagreement we have with the respondents is whether we must *reveal* that an appropriate document has been prepared with respect to the storage of nuclear weapons at West Loch and *disclose* the document to the public.

There are occasions when the broader public interest in secrecy must prevail over the interest in full public information concerning what government is doing. This is such a case. As Viscount Simon wrote in *Duncan* v. *Cammel Laird & Co., Ltd.* [1942] A.C. 624; [1942] All E.R. 587, 595-596, H.L., in a decision upholding the British government's refusal to disclose certain secret information:

> After all, the public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the court of appeals should be reversed, with a direction to dismiss the complaint.

Respectfully submitted.

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OCTOBER 1981

DOJ-1981-10

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 45-80C

FILED
JUN 27 1980
COURT OF CLAIMS

A.H. Simrick

v.

The United States

Contraction alleged agreement with CIA for undercover activities; *Totten* v. *United States*, 92 U.S. 105.

JUN 27 1980

John D. Sims, attorney of record. *Dameron & Sims*, of counsel.

Ellen J. Sazzman, with whom was *Assistant Attorney General Alice Daniel*, for defendant.

Before DAVIS, *Judge*, Presiding, KUNZIG and BENNETT, *Judges*.

ORDER

The petition of plaintiff A.H. Simrick alleges that, from 1969 through 1976, he entered into a contract with the Government (acting through the Department of State and the Central Intelligency Agency) providing that (a) defendant was to pay plaintiff an initial retainer of $5,000; (b) defendant was to pay plaintiff $20,000 per year as salary; (c) plaintiff was to set up a business in Mauritius to act as a

"cover" for agents of the CIA and to provide information; (d) plaintiff was to provide defendant with field offices with identification badges; (e) plaintiff was to provide a meeting place for the CIA in Mauritius; (f) defendant was to buy all the output of plaintiff's business produced in Mauritius at the fair matket rate and was to wholly support plaintiff's company in Mauritius; and (g) defendant was to pay all moving and resettling costs of plaintiff. The petition then alleges that (i) plaintiff carried out his agreement and formed two companies, Le Baron and Le Sega, to produce, manufacture and sell ties; (ii) defendant has refused to pay plaintiff anything more than $9,300, the bulk of which was received in 1978; and (iii) plaintiff is due $219,000 (plus costs and interest), "including loans the Plaintiff was forced to procure to keep the company in operation as a result of the Defendant's failure to purchase the output of the Plaintiff and to support the company."

Defendant has moved to dismiss the petition, mainly on the authority of *Totten* v. *United States*, 92 U.S. 105 (1875). In that more-than-a-century-old decision coming from this court, the Supreme Court assumed that the plaintiff's decedent had a contract with President Lincoln (made in July 1861) by which the decedent "was to proceed South and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts and fortifications, and gain such other information as might be beneficial to the government of the United States, and to report the facts to the President; for which services he was to be paid $200 a month." It was also assumed that in fact the decedent was only reimbursed his expenses. The Supreme Court had no difficulty with the President's authority to make such a contract, but it held that nevertheless the claimant could not enforce the contract in the Court of Claims. "The service stipulated by the contract was a secret

service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent. If upon contracts of such a nature an action against the government could be maintained in the Court of Claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed to the serious detriment of the public. * * * The secrecy which such contracts impose precludes any action for their enforcement. * * *." 92 U.S. at 106-107.

Defendant says that plaintiff's case falls squarely under *Totten*, that inquiry into the case would necessarily involve the precise nature of the alleged contractual understandings between the parties, including the parties' alleged responsibilities under the contract, a detailed description of the duties plaintiff may have actually performed, and a description of any action defendant may have taken pursuant to the contract. It is also said that plaintiff "would have to detail any dealings he may have had with particular officers of the CIA with respect to the formation of the alleged contract and the performance of duties pursuant to the contract, even though many of those CIA employees might work under cover."

Plaintiff's response is that *Totten* involved a direct spy, while plaintiff acted more as an administrative employee of the CIA, sent to set up a business, run the intelligence gatherers through his business as a front opertaion, and manufacture ties to be sent back to the United States and sold by the domestic corporations. We are told that plaintiff's information gathering role was insignificant compared to his administrative functions as a corporate businessman; and that his suit is for acting as a corporate businessman, setting up two corporations, providing employment roles and meeting places, and providing day-to-day information on the political climate in Mauritius. We are also told that very little of a secret nature is left in the case, and what there is can be disclosed *in camera* in the court's discretion.

On what we now have before us, we have to say that plaintiff's case falls under *Totten*. This is not a suit between private parties. The contract, if there was one, was with the United States; according to plaintiff he was to engage significantly in undercover intelligence work for the Government; his alleged dealings seem to have been oral and very probably with CIA operatives not otherwise known to the public. We doubt very much that plaintiff could make his case, or the defendant put up its defense, without revealing secret matters which should not be disclosed. In the words of *Totten*, both plaintiff and the Government "must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment * * *."92 U.S. at 106. The agents in such a secret service "must look for their compensation to the contingent fund of the department employing them, and to such allowances from it as those who dispense that fund may award. The secrecy which those contracts impose precludes any action for their enforcement." 92 U.S. at 107. Those holdings all seem to apply here. They have been

summarily reaffirmed in *United States* v. *Reynolds*, 345 U.S. 1, 11 n.26 (1953).

IT IS THEREFORE ORDERED, without oral argument, that defendant's motion to dismiss is granted and the petition is dismissed.

JUN 12 1981

BY THE COURT

Oscar H. Davis
Judge, Presiding

IN THE UNITED STATES COURT OF CLAIMS

No. 605-80C

FILED
JUN 12 1981
COURT OF CLAIMS

Carmen Mackowski

v.

The United States

Contracts; alleged agreement with CIA for espionage activities; lack of waiver of privilege.

JUN 12 1981

Willaim Z. Shulman, attorney of record, for plaintiff. *Greenberg and Feiner*, of counsel.

Kathleen A. Flynn, with whom was *Acting Assistant Attorney General Thomas S. Martin*, for defendant. *E. Page Moffett*, Central Intelligence Agency, of counsel.

Before NICHOLS, *Judge*, Presiding, KASHIWA and SIMTH, *Judges*.

ORDER

This case is before us on defendant's motion to dismiss plaintiff's petition. We agree with defendant and thus dismiss the petition.

Plaintiff alleges she was an employee of the Central Intelligence Agency (CIA), hired to perform espionage activities in Cuba. Her contract of employment allegedly commenced in December 1964 and ceased when she was released from a

Cuban prison in 1977. Plaintiff further alleges the defendant paid some of the money owed her but has refused to pay the balance she claims is owed: expenses, related costs, medical bills, and various disability, social security and other compensation benefits.

Defendant's motion to dismiss is premised on *Totten* v. *United States,* 92 U.S. 105 (1875), and our order in *Simrick* v. *United States,* Ct. Cl. No. 45-80C (order entered June 27, 1980).

Totten is very similar to our case, involving the beneficiaries of an estate who sued the United States for money allegedly owed the decedent as a result of espionage work performed during the Civil War. The Supreme Court assumed the decedent had a contract with President Lincoln to "proceed South and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts and fortifications, and gain such other information as might be beneficial to the government of the United States * * * for which services he was to be paid $200 a month." 92 U.S. at 105-106.

The Supreme Court held that such a claimant could not enforce his contract in the Court of Claims:

> The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a

> disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent. If upon contracts of such a nature an action against the government could be maintained in the Court of Claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public. A secret service, with liability to publicity in this way, would be impossible; and, as such services are sometimes indispensable to the government, its agents in those services must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that fund may award. The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery. [*Id.* at 106-107.]

Simrick applied the holding of *Totten* to a supposed agent of the CIA who alleged *Totten,* which involved a direct spy, was inapplicable to himself, a more or less administrative employee. This court rejected that analysis on the ground that the assertion and defense of such a case would reveal secret matters which should not be disclosed. Relying then on *Totten,* we held the secrecy imposed by such espionage-type contracts precludes any action for their enforcement.

Plaintiff here does not even mention the *Simrick* order. Instead, plaintiff alleges that under *United States* v. *Reynolds,* 345 U.S. 1 (1953), *Totten* is no longer the law. The panel in *Simrick,* however, disagrees with plaintiff; it held the *Totten* holding was summarily reaffirmed in *United*

States v. *Reynolds*, 345 U.S. at 11 n.26. Order at 4. Thus, we reject that argument of plaintiff's.

Plaintiff also asserts that the defendant waived a *Totten*-type defense. While plaintiff was released from the Cuban prison due to the efforts of then Senator Frank Church, such action cannot be construed as a public confirmation or publication that plaintiff performed espionage services for the United States. Cf. *United States* v. *Marchetti*, 466 F. 2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972) (rumor and speculation are not the equivalent of public disclosure; and the presence of that kind of surmise is no reason for avoidance of constraints on publication). Nor can defendant's assertion before the district court that such court lacked jurisdiction under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.* (1976), because plaintiff failed to file an administrative claim, as required by 28 U.S.C. § 2675, constitute a public admission of plaintiff's allegations.

In short, this case is controlled by *Totten* and *Simrick*. We are satisfied that the defendant has properly invoked this privilege. Because of the nature of the parties' alleged agreement, it is obvious the claim could not be prosecuted or defended without revealing secret matters which should not be disclosed. Hence, "the secrecy which [the alleged contract] impose[s] precludes any action for [its] enforcement." *Totten*, 92 U.S. at 107. Cf. *Snepp* v. *United States*, 444 U.S. 507 (1980) (*per curiam*) (highlighting the importance of confidentiality with respect to intelligence gathering).

IT IS THEREFORE ORDERED, without oral argument, that defendant's motion to dismiss is granted and the petition is dismissed.

JUN 12 1980

BY THE COURT

Shiro Kashiwa
Judge

No. 80-1377

In the Supreme Court

OF THE

United States

OCTOBER TERM 1980

Supreme Court, U.S.
FILED
JUN 26 1981
ALEXANDER L. STEVAS,
CLERK

CASPAR W. WEINBERGER, *Secretary of Defense, et al.*,
Petitioners,

vs.

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF FELLOWSHIP OF RECONCILIATION, et al., AMICI CURIAEM, IN SUPPORT OF RESPONDENTS

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IN THE SUPREME COURT
OF THE
UNITED STATES

October Term 1980

No. 80 - 1377

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL.,

Petitioners,

v.

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE OF THE FELLOWSHIP OF RECONCILIATION, THE GENERAL CONFERENCE MENNONITE CHURCH, THE COALITION FOR A NEW FOREIGN AND MILITARY POLICY, CLERGY AND LAITY CONCERNED, THE WAR RESISTERS LEAGUE/ WEST, SANE, THE MT. DIABLO PEACE CENTER, NATIONAL LAWYERS GUILD - SAN FRANCISCO BAY AREA CHAPTER, NUKEWATCH, BROTHERS OF HOLY

CROSS-EASTERN PROVINCE, GROUND ZERO CENTER FOR NONVIOLENT ACTION, THE TRAPROCK PEACE CENTER, THE INTERFAITH CENTER TO REVERSE THE ARMS RACE, NUCLEAR FREE STATE, PEACE EDUCATION AND ACTION CENTER, ENVIRONMENTAL ACTION, THE DOGWOOD ALLIANCE, THE CATFISH ALLIANCE, NUCLEAR INFORMATION AND RESOURCE SERVICE, TRADE UNIONISTS FOR DEMOCRATIC ACTION, THE THOMAS MERTON CENTER, THE ENVIRONMENTAL POLICY CENTER, THE RESOURCE CENTER FOR NON-VIOLENCE, THE UNIVERSITY OF WISCONSIN PEACE CONVERSION PROJECT, THE MX ACTION GROUP, THE SOUTH PLAINS ALTERNATIVE RESOURCES COALITION, NETWORK, THE SISTERS OF MERCY, THE INTERCOMMUNITY CENTER FOR JUSTICE AND PEACE, STOP PROJECT ELF INC., THE 8TH DAY CENTER FOR JUSTICE, CITIZENS' CALL, THE CALDWELL DOMINICANS, THE SOCIAL JUSTICE COMMITTEE OF THE SISTERS OF ST. JOSEPH, THE SISTERS OF ST. JOSEPH OF PEACE, THE DOMINICAN SISTERS OF THE SICK POOR, THE URSULINE SISTERS OF BLUE POINT, THE BROTHERS OF HOLY CROSS, THE PAULIST SOCIAL COMMITTEE, THE BLAUVELT DOMINICANS, THE BENDIX CONVERSION PROJECT, THE INTERFAITH PEACE FELLOWSHIP, SAFE, APPROPRIATE FORMS OF ENERGY, THE SAGEBRUSH ALLIANCE, THE UNIVERSITY OF CALIFORNIA NUCLEAR WEAPONS LABS CONVERSION PROJECT, PRIESTS OF THE

SACRED HEART, AND THE RIVERSIDE DISARMAMENT PROJECT, IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule No. 36, Fellowship of Reconciliation, et al., respectfully submit this brief amici curiae in support of respondents. Consent to the filing of this brief has been granted by counsel for both parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

The Fellowship of Reconciliation (Box 271, Nyack, NY 10960) is an international, inter-religious organization which believes in and works for the nonviolent settlement of disputes among persons and among nations. The Fellowship regards nuclear weapons as the ultimate expression of violence. It believes the public can best be protected against the threat they represent by widespread dissemination and discussion of the relevant facts concerning their manufacture, storage and deployment.

The General Conference Mennonite Church (722 Main Street, Newton, KS 67114) comprises 325 congregations in the United States and Canada, with a total adult membership of 62,962. It is an historic peace

church whose heritage includes a commitment to peacemaking since the Sixteenth Century in Europe's Reformation. The church and its members have been involved for the past decade in public education about the local hazards and global threat to peace posed by the manufacture and deployment of nuclear weapons.

The Coalition for a New Foreign and Military Policy (120 Maryland Ave., N.E., Washington, CA 20002) is composed of 46 national labor, religious, peace, research and social action organizations working for a peaceful, non-interventionist and demilitarized U.S. foreign policy.

Clergy and Laity Concerned (198 Broadway, New York, NY 10038) is a nationwide inter-denominational organization which works for the alleviation of injustice and human suffering in a variety of social areas. The organization holds nuclear weapons storage to be a potential danger requiring urgent public examination.

The War Resisters League/West (85 Carl St., San Francisco, CA 94117) is a longtime nonviolent organization opposing war and the causes of war. WRL/West is a cofounder and active participant in the national Nuclear Weapons Facilities Task

Force and continues to be active in organizing around Bay Area nuclear weapons facilities. It is involved in educating the public on the dangers and risks of nuclear weapons.

S.A.N.E. is a national citizens organization founded more than twenty years ago during the contraversy around the health effects of open air nuclear weapons testing. S.A.N.E. believes our citizenry has the right to full information about all aspects of nuclear weapons which affect our health and safety.

The Mt. Diablo Peace Center in Walnut Creek, CA was established in 1969 primarily to educate and activate local citizens around the threats of nuclear weapons and war. The Concord Naval Weapons Station Task Force is made up of individuals who are joined in outrage by the liberties taken with our health and safety in the name of national security. It believes that Environmental Impact Statements for all nuclear weapons facilities are essential to our real security.

The National Lawyers Guild-San Francisco Bay Area Chapter (558 Capp. St., San Francisco, CA 94110) consists of over nine hundred lawyers, law students, legal workers

and jailhouse lawyers involved in the movement for fundamental social change. The Guild advocates a halt to the proliferation of nuclear weapons, nuclear power facilities and radioactive wastes.

Nukewatch (315 West Gorham St., Madison, WI 53703) is the public education project of The Progressive Foundation, a tax-exempt educational institution formed to promote the exercise of First Amendment rights and foster public awareness of, and debate around, issues of urgent public concern. In the belief that decisions on crucial nuclear issues should be made by an informed citizenry, Nukewatch has focused on lifting the shroud of secrecy and mystery from nuclear issues and helping the public get the information it needs to make informed decisions.

Brothers of Holy Cross-Eastern Province (85 Overlook Circle, New Rochelle, NY 10804) is part of an international congregation of priests and brothers engaged in pastoral and education work. Through shareholder resolutions, the organization has addressed various corporations on their involvement in the production of nuclear arms. With Pope John Paul II, it opposes the use of nuclear weapons and attempts to educate the

public about the dangers of nuclear arms and the arms race.

Ground Zero Center for Nonviolent Action (16159 Clear Creek Road, N.W., Poulsbo, WA 98370) is a center oriented toward education and direct action on arms issues. The organization believes that full disclosure of the environmental impact of nuclear weapons stored by the U.S. Navy is essential to public health and safety in the Puget Sound area of the State of Washington.

The Traprock Peace Center (Woolman Hill, Keets Road, Deerfield, MA 01342) is an organization which works for global disarmament through mutual agreement between the United States and the Soviet Union on a moratorium on further nuclear weapons production. It believes that full knowledge of the environmental impact of nuclear weapons will facilitate that goal.

Nuclear Free State (1145 E. 6th St., Tucson, AZ 85719) is a public interest citizens group devoted to eliminating the environmental and public health threat presented by nuclear power and nuclear weapons in Arizona. It favors full disclosure of the environmental impact of nuclear weapons storage and deployment.

Peace Education and Action Center (64 Edgewood Ave., New Haven, CT 06511) is an organization dedicated to achievement of a more peaceful world through public education and action. It is concerned about the threat posed to world peace and safety by the manufacture, storage and deployment of nuclear weapons.

Environmental Action (1346 Connecticut Ave., N.W., Washington, DC 20036) is a 25,000 member lobby focusing on environmental issues, particularly those having high urban impact. The organization favors full disclosure of the environmental impact of nuclear weapons on urban life.

The Dogwood Alliance (5904 West Markham, Little Rock, AR 72205) is a public interest group devoted to increased public awareness of environmental issues in Arkansas and to the promotion of safe energy alternatives. It believes that nuclear power and nuclear weapons pose grave environmental hazards.

The Catfish Alliance (814 St. Francis St., Mobile, AL 36602) is an organization devoted to protecting and improving the quality of life among the Gulf Coast people in southern Alabama. It advocates full disclosure of any possible threats to the environment from nuclear sources.

Nuclear Information and Resource Service (1536 16th St., N.W., Washington, DC 20036) is an information clearinghouse and networking center for citizens concerned about nuclear energy. It is also deeply concerned about the hazards associated with the nuclear weapons race.

Trade Unionists for Democratic Action (P.O. Box 294, Boro Station, Groton, CT 06340) is an organization of rank-and-file workers in the Electric Boat Division of General Dynamics Corporation. As workers employed at a nuclear weapons production facility engaged in the construction of nuclear fast-attack and Trident ballistic submarines, the organization is concerned about the accountability and occupational and environmental safety of the storage, transportation, production and deployment of nuclear weapons.

The Thomas Merton Center (1111 East Carson St., Pittsburgh, PA 15206) is a Pittsburgh-based peace and justice ministry with members throughout the United States. Its members attempt to confront and transform the buildup of nuclear arms through education in churches and schools and by means of public protests.

The Environmental Policy Center (317

Pennsylvania Ave., S.E., Washington, DC 20003) is a private, non-profit public interest group dedicated to the solution of environmental issues. It believes the preparation of environmental impact statements for nuclear weapons production and storage facilities is essential to the public interest.

The Resource Center for Non-Violence (515 Broadway, Santa Cruz, CA 95062) is a non-profit public education project devoted to the promotion of non-violence as a force for personal and social change. The Center believes nuclear weapons to be a form of systemic violence having broad impact on society and the environment.

The University of Wisconsin Peace Conversion Project (315 Gorham St., Madison, WI 53705) is a citizens' organization dedicated to the conversion of military research at the University of Wisconsin to peaceful purposes. It is particularly concerned about the adverse impact of research leading to the military use of nuclear energy.

The MX Action Group (2606 22nd St., Lubbock, TX 79410) is an educational organization which seeks to promote a broader understanding among the people of West Texas

of the full impact of deployment of the MX missile proposed by the United States Air Force. It believes that access to knowledge about nuclear weapons deployment is essential to an understanding of such issues.

The South Plains Alternative Resources Coalition (Box 4026, Lubbock, TX 79404), serving the academic community of Texas Tech University, is a citizens' organization which explores the interconnections between nuclear energy and nuclear weapons. It believes safe energy can best be achieved on the basis of full public understanding of the issues surrounding nuclear weapons.

NETWORK (806 Rhode Island Ave., N.E., Washington, DC 20018) is a Catholic social justice lobby which focuses on social justice issues and human rights as affected by national legislation. Participation of people in decisions that affect them, and faithful stewardship of the earth, are values NETWORK would see promoted by a nuclear weapons environmental impact statement.

The Sisters of Mercy (10024 South Central Park Ave., Chicago, IL 60642) are a Roman Catholic religious congregation of women whose mission is to minister to the poor, the sick, the uneducated, and anyone

wounded by contemporary society. The Sisters believe that full disclosure of the facts about nuclear weapons will demonstrate that their presence constitutes a tremendous threat to the welfare of human beings.

The Intercommunity Center for Justice and Peace (20 Washington Square North, New York, NY 10011) was established by religious congregations in the greater New York City area to solve social problems in ways which consistently reflect Gospel values. Its present focus is on disarmament and human rights.

Stop Project ELF, Inc. (Rural Route 2, Box 166Q, Ashland, WI) is a non-profit membership organization which, among other things, disseminates information on the health and environmental effects of nuclear weapons systems, especially the United States Navy's "Project ELF" communications system designed to send messages to submarines. The organization believes that the nuclear arms race threatens public health and safety, and that the first step in addressing the crises is the development of public information about the health and environmental consequences of nuclear weapons systems.

The 8th Day Center for Justice (22 East

Van Buren, Chicago, IL 60605) is a coalition of ten Catholic religious communities which work toward building a just society. One primary focus is educating others to the danger of nuclear weapons. This is well summarized in the Church's 1976 statement to the United Nations: "The armaments race is to be condemned unreservedly. By virtue of the nature of modern weapons...[it] is in fact a danger, an injustice, a mistake, a wrong, a folly...Christians must denounce humanity's scientific preparations for its own demise. They must also alert public opinion to the growing perils resulting from nuclear excesses (explosions) and from the transport, stockpiling and proliferation of atomic weapons."

Citizens' Call (1321 East 400 South, Salt Lake City, UT 84720) is a non-profit citizens' organization which seeks compensation for the radiation victims of the United States nuclear weapons testing and the discontinuation of further nuclear weapons testing. The organization believes that full disclosure of the physical effects of nuclear weapons is essential to the public interest.

The Caldwell Dominicans (119 Clerk St., Jersey City, NJ 07305); the Social Justice

Committee of the Sisters of St. Joseph of Peace (P.O. Box 288, Jersey City, NJ 07303); the Dominican Sisters of the Sick Poor (475 Riverside Drive, New York NY 10027); the Ursuline Sisters, Blue Point, NY (81-15 Utopia Parkway, Jamaica, NY 11432); the Brothers of Holy Cross (St. Joseph Center, Valatie, NY 12184); the Paulist Social Committee (86 Dromore Road, Scarsdale, NY 10583); and the Blauvelt Dominicans (460 W. 44th St., New York, NY 10036) are Roman Catholic religious orders promoting world peace and justice. They believe the interests of the American people would best be served by full discussion of the implications of nuclear weapons.

The Bendix Conversion Project (811 E. 47th St., Kansas City, MO 64110) is a citizens' group which seeks conversion of the Kansas City factory of the Bendix Corporation, which now manufactures parts for thermonuclear weapons, to peaceful purposes. The Project believes that disclosure of the full impact of nuclear weapons is essential to its objective.

The Interfaith Peace Fellowship (2909 Pinewood Drive, Virginia Beach, VA 23452) is an inter-denominational citizens' group which works for social justice and the

peaceful settlement of disputes. The Fellowship advocates full discussion of the potential hazards of nuclear weapons.

The Sagebrush Alliance (704 West McWilliams, Las Vegas, NV 89106) is a public interest group which seeks to protect citizens of southern Nevada from the effects of nuclear weapons testing, nuclear waste dumping, and similar pollutants. It advocates full disclosure of the environmental, economic, and public health impact of nuclear activities.

The University of California Nuclear Weapons Labs Conversion Project (944 Market St., San Francisco, CA 94102) is a broad-based citizens' group which seeks conversion of the University of California nuclear weapons labs at Los Alamos, NM, and Livermore, CA, to peaceful purposes. The Project long has advocated full disclosure of the environmental impact of nuclear weapons.

Priests of the Sacred Heart (Sacred Heart Monastery, WI 53130) is a Roman Catholic religious order which favors peaceful settlement of international disputes. The organization believes the public should be made fully aware of the hazards of nuclear weapons.

The Interfaith Center to Reverse the Arms Race (132 North Euclid Ave., Pasadena, CA 91101) seeks to educate and mobilize the religious community of Southern California to raise a voice of conscience in concerted opposition to the nuclear arms race. By local education and organizing programs--which become models that can be applied elsewhere--it seeks to contribute to national efforts. The Center believes that people are empowered to act when equipped with knowledge. Therefore, it is imperative that knowledge about the nuclear arms race include public information about the manufacture, storage, and deployment of nuclear weapons.

Safe Appropriate Forms of Energy (901 West State St., Athens, OH 45701) is an anti-nuclear, pro-alternative energy group made up of concerned citizens and students in Athens, Ohio. It seeks to educate the public on the dangers of nuclear power and nuclear weapons, and on the link between the two.

The Riverside Church Disarmament Program is involved in an effort to educate and activate the religious community nationwide on the growing threat of nuclear and conventional war. As part of its work to halt and reverse the arms race, it believes

that informed discussion about the health, safety and environmental implications of nuclear weapons production and deployment is essential and long overdue.

STATEMENT OF THE CASE

Amici here incorporate by reference the Statement of the Case set out in the Brief for Respondents filed herein.

SUMMARY OF ARGUMENT

The legislative history of the National Environmental Protection Act of 1969, 42 U.S.C. §4321, et seq. and the judicial interpretations following its enactment evince a powerful public policy in favor of requiring compliance with its procedural requirements even where security interests are at stake. In attempting to shield their acts from the scrutiny required by NEPA in a situation involving the safety of hundreds of thousands of people, Petitioners offer the worn rationale that information necessary to inform the decisionmakers and the public of the consequences of nuclear weapons storage is "classified" and "restricted." If this classification actually protected such data from circulation and public dissemination, Petitioners' argument might have some validity. In fact, the presence of nuclear weapons at many places in the United States

is common knowledge notwithstanding the refusal of the Department of Defense to confirm or deny exact locations. Information about the location and general characteristics of such weapons can be obtained readily from public sources.

Even if the location of nuclear weapons were not a matter of common knowledge in the United States, the information is doubtless known to other nations by means of advanced satellite and other technologies.

The refusal of responsible authorities to acknowledge what is in fact known to the general public or to other nations, or both, leaves the government and public unprepared to cope with potential dangers arising from the presence of nuclear weapons.

The result of Petitioners' futile and fruitless policy of refusing to confirm or deny the presence of nuclear weapons at any particular location is that no one has examined the potential hazards of stationing and storing nuclear weapons at various places in the United States, some of them close to major population centers.

There is a growing trend in constitutional and statutory law toward protecting and extending the public's right to infor-

mation concerning its health. NEPA and the Atomic Energy Act of 1946, as amended 42 U.S.C. §§2011, et seq., along with regulations promulgated pursuant to these statutes, specifically recognize the interest in public dissemination of technical information. Recent legislation in the field of toxic substances, pesticides and water pollution control also evidence this policy. At a time when scientific information must be accessible for citizens to make informed decisions intimately affecting their health and welfare, this and other courts have articulated a doctrine protecting a right of access to such information. Failure to require an Environmental Impact Statement in the case sub judice would imperil this policy.

For these reasons, amici join with Respondents in urging that the ruling of the United States Court of Appeals for the Ninth Circuit be upheld and that the Petitioners be ordered to comply with the Environmental Impact Statement provisions of the National Environmental Policy Act.

INTRODUCTION

Petitioners have argued that they cannot comply with the mandates of the National

Environmental Policy Act because they can neither confirm nor deny the presence of nuclear weapons at any particular location, and that to prepare an Environmental Impact Statement would identify the presence, design and type of such weapons. For the reasons set forth below, amici believe that Petitioners' non-acknowledgement policy is an inadequate justification for refusing to prepare an Environmental Impact Statement, and for refusing to give the public the information it needs to make intelligent decisions concerning crucial questions of public safety and, perhaps, survival.

ARGUMENT

I

LEGISLATIVE HISTORY OF THE NATIONAL ENVIRONMENTAL PROTECTION ACT AND INTERPRETATIVE CASE LAW INDICATE THE SIGNIFICANCE WHICH HAS BEEN ATTACHED TO COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS OF THE ACT

Petitioners state that "NEPA requires no more than that agencies comply with its policies 'to the fullest extent possible,'" citing §102 of the Act, 42 U.S.C. 4332. (Brief of Petitioners at p. 18, emphasis added.) Their interpretation ignores the import attached to this language by its

drafters:

> [It] is the intent of the conferees that the provision "to the fullest extent possible" shall not be used by any Federal Agency as a means of avoiding compliance with the directives set out in section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section "to the fullest extent possible" under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance. 115 Cong. Rec. (parts 29 and 30) 39702-39703 (1969) House Conferees) and Id., 40417-40418 (1969) (Senate Conferees).

While the bill was still in committee, Senator Jackson, NEPA's principal sponsor, characterized the requirements of §102 as "action-forcing" and stated that "[o]therwise, the lofty declarations [in §101] are nothing more than that." Hearings on S.1075, S. 237 and S. 1752, Before Senate Committee on Interior and Insular Affairs, 91st Cong.

1st Sess. 116 (1969). The Committee's Report stressed the importance of the "action-forcing" provisions, viewing them as requiring full and rigorous consideration of environmental values as an integral part of agency decisionmaking. S. Rep. No. 91-296, 91st Cong., 1st Sess. (1969). Once the bill reached the Senate Floor, Senator Jackson once again stressed the importance of the procedural provisions:

> To insure that the policies and goals defined in this act are infused into the ongoing programs and actions of the Federal Government, the act also establishes some important "action-forcing" procedures. 115 Cong. Rec. (Part 30) at 40416.

Case law has followed the Congressional mandate in this regard. In a full exposition of the background and purposes of NEPA, Calvert Cliffs Coord. Com. v. United States A.E. Com'n 449 F. 2d 1109, 1112 (DC Cir. 1971) Justice Skelly Wright declared that "Perhaps the greatest importance of NEPA is to require the Atomic Energy Commission and other agencies to consider environmental issues just as they consider other matters within their mandates." Aware of the strength of the Congressional intent to force compliance with

NEPA by federal agencies, Justice Wright made the expressed views of the bill's drafters "the dispositive factor in our interpretation" of NEPA's provisions and insisted that the phrase "to the fullest extent possible" of §102 "does not provide an escape hatch for foot-dragging agencies ...Congress did not intend the Act to be such a paper tiger." Id., at 1114.

In that case, the foot-dragging agency was the Atomic Energy Commission, which had proposed inadequate regulations to govern environmental impact considerations in the construction of nuclear power plant facilities. Of these regulations, Justice Wright said:

> We believe that the Commission's crabbed interpretation of NEPA makes a mockery of the Act. Id., at 1117.

In this case, Petitioners have cast a bogus shroud of secrecy around information regarding storage sites for nuclear weapons and assert that labeling something "restricted" makes it so. By means of such semantic legerdemain, Petitioners intend to insulate all their actions regarding the subject of such data from the "action-forcing" provisions of NEPA.

Other courts have followed Justice

Wright's lead. In Rhode Island Committee on Energy v. the General Services Administration, 397 F. Supp. 41 (R. I. 1975), defendant General Services Administration proposed to dispose of surplus government property to an electric utility which planned to construct a nuclear power plant on the site. Defendants proffered the justification that the state of urgency caused by the nation's energy crisis and the unique suitability of the site should permit the sale without the filing of an EIS. The court would not permit the spectre of the energy crisis to excuse full compliance with NEPA. Id., at 58.

Other circuits have demonstrated the same reluctance to excuse compliance with the procedural requirements of NEPA. In Ely v. Velde, 451 F. 2d 1130 (4th Cir. 1971) Plaintiff sought to compel Defendant Law Enforcement Assistance Administration (LEAA) to file an EIS prior to constructing a medical and reception center for Virginia prisoners. Defendant contended that the governing statute for the LEAA, 42 U.S.C. §3701 et seq. (the "Safe Streets Act"), precluded NEPA interference or any Federal interference in the spending of their grant. In examining the "Safe Streets Act" the

Court found that a purpose of the Act was the protection of local police autonomy. However, the Court found no reason why that legislative goal should undercut the solution adopted by Congress to preserve and protect other important societal values including our natural and cultural environments. See also City of Rochester v. U.S. Postal Service, 541 F. 2d 967 (2d Cir. 1976); National Helium Corp. v. Morton, 326 F. Supp. 151-156 (Kan. 1971) aff'd. 455 F. 2d 650 (10th Cir. 1971).

Compliance with §102 of NEPA may be excused only when an agency can point to a clear and unavoidable conflict with other statutory authority. Of these purported conflicts courts have found "surprisingly few." W. Rodgers, Handbook on Environmental Law (1977) at 718. Courts have looked to the Congressional intent behind both statutes in determining whether a conflict exists. Generally a conflict has been found only where the delay inherent in compliance with the EIS process would frustrate the purpose of the other statute. Flint Ridge Development Company v. Scenic Rivers Association of Oklahoma, 426 U.S. 776 (1976); Gulf Oil Corporation v. Simon, 502 F. 2d 1154 (Temp. Em. Ct. App. 1974); Atlanta Gas Light Company v.

Federal Power Association, 476 F. 2d 142 (5th Cir. 1973); Cohen v. Price Comm'n, 337 F. Supp. 1236 (S.D.N.Y., 1972); Rodgers, Handbook, 718, 764.

There is no national security exemption. As Judge Tamm wrote in an opinion for the District of Columbia Circuit, "There is no support in either the statute or the cases for implying a 'national defense' exemption from NEPA. (Citing cases) The Navy, just like any federal agency, must carry out its NEPA mandate 'to the fullest extent possible' and this mandate includes weighing the environmental costs of the Trident Program even though the project has serious national security implications." Concerned About Trident v. Rumsfield, 555 F. 2d 817, 823 (D.C. Cir. 1977). In that case, the Navy had prepared an inadequate EIS on a proposed site of a support facility for the Trident submarine program. See also Jackson City, Mo. v. Jones, 571 F. 2d 1004 (8th Cir. 1978); Natural Resources Defense Council, Inc. v. Morton, 458 F. 2d 827 (D.C. Cir. 1972).

In summary, while the general substantive policy of NEPA is a flexible one, its procedural provisions establish a strict standard of compliance and are "enforced

with a vengeance." Calvert Cliffs, supra, at 1112 and Rodgers, supra, at 717. In the words of one district court, "It is hard to imagine a clearer or stronger mandate to the Courts." Texas Committee on Natural Resources v. United States, 1 Envir. Cas. 1303, 1304 (W.D. Texas, 1970).

II

A CLOSE LOOK AT THE EXTENT OF INFORMATION PUBLICLY AVAILABLE ON THE LOCATION AND ACTIVITIES OF NUCLEAR WEAPONS STORAGE FACILITIES REVEALS THAT PETITIONERS' RELIANCE ON "CLASSIFIED INFORMATION" EXALTS SEMANTICS OVER REALITY.

In Concerned About Trident, supra, the court rejected the Navy's reliance on "the over-used rubric of national defense." Id., at 823. In this case, the Navy invokes yet another shibboleth, the policy of preserving the confidentiality of "classified information" and "restricted data." It is contended that preparation of an EIS, "...would necessarily reveal highly classified information about the types of weapons in our nuclear arsenal, their design and capabilities, the design capacities and vulnerabilities of the facilities in which they are stored, and the security measures employed in connection

with them." (Petitioners' Brief at page 11) It is further insisted that in order to protect this classified information, Petitioners must engage in an administrative shellgame requiring the preparation of an EIS for every site which could possibly house nuclear weapons. In fact, information about the location and general characteristics of such weapons can be readily obtained from public sources. (See for example Exhibit A to this Brief, attached and incorporated herein by reference.)

A. <u>The presence of nuclear weapons at many places in the United States is common knowledge notwithstanding the refusal of the Department of Defense to confirm or deny exact locations.</u>

1. The presence of nuclear weapons is made known to any interested observer by elaborate and conspicuous security devices prescribed for their protection.

The typical nuclear weapons storage site has been described in <u>ARMY</u> magazine:

> The storage sites are usually concrete-and-steel underground 'igloos' surrounded by double anchor chain fences with sophisticated sensors (IDS, or intrusion detection systems) which react to

> noise, magnetism, movement or seismic effect (earth tremor). The igloos are floodlighted at night and constantly guarded. Besides the guards at each site there are 'reaction' or alert forces in nearby hardened buildings ready to defend the site when the alarm sounds. (Army, June, 1977)

More precise and detailed descriptions of the security systems which identify U.S. weapons storage sites can be found in "New Technology for Intrusions Detection at U.S. Bases," by J. Philip Geddes, in International Defense Review, No. 5, 1977; "Security Lighting for Nuclear Weapons Storage Sites: A Literature Review and Bibliography," by Patrick Maguire, Joel Kramer, and Addie Stewart, National Bureau of Standards Special Publication 400-27, November, 1977, and the "Fact Sheet on Safeguards" available from the U.S. Department of Energy.

Security devices matching these specifications have been observed at numerous Defense Department facilities, including the U.S. Naval Weapons storage depots at Seal Beach and Concord, California. (See, for example, the transcript of "Broken Arrow: Can a Nuclear Weapons Accident Happen Here?" a documentary produced by the KQED Public

Affairs Department, Channel 9, San Francisco, and recently aired throughout the country; and "Where the Bombs Are," by David E. Kaplan, New West, April 1981, page 76 et seq.) A 1975 Congressional report on security at nuclear installations concluded that "nuclear storage sites are easily identifiable" by the general public. One of the report's authors stated that, "Very frankly, we do not tell people what is there, but a man would have to be a fool not to know what is there, and there you are." ("Security Review of Certain NATO Installations," Congressional Record, April 30, 1975, page S7185.)

2. In many instances, nuclear weapons have been directly observed by the general public in the vicinity of military bases.

Photographs of a nuclear weapon being loaded aboard a helicopter in Hawaii appeared in newspapers in Honolulu, San Francisco, and Baltimore in 1976. In Seal Beach, California, where nuclear weapons bunkers are readily visible from a nearby highway, nuclear weapons have been photographed being loaded onto ships at a Navy dock and trucks carrying nuclear weapons have been followed as far east as Riverside, California. Kaplan, New West, p. 82.

Authoritative information on the location of nuclear weapons also has been circulated by former workers, guards, and other military personnel in a position to know. Thus, a former Marine security guard said in an interview in "Broken Arrow" (KQED), "I was stationed as a Marine Security Guard in Concord, California, and I was cleared for Secret. It was common knowledge there were nculear weapons stored up on the hill in Concord where all the lights were. My job was to guard them. They were cylindrical objects about ten to twenty feet in length, maybe six feet in width. There was a little sign on them that said they were radioactive material. And we were given a few seminars by the security captain explaining what nuclear arms were, etc."

3. On the basis of independent inquiries by newspapers and periodicals, numerous Defense Department installations have been repeatedly identified as harboring nuclear weapons.

In California alone these installations include the Sierra Army Depot, Castle Air Force Base, Mather Air Force Base, Travis Air Force Base, Moffett Naval Air Station, Alameda Naval Air Station, Lawrence Livermore Laboratory, Mare Island Naval Shipyard,

March Air Force Base, George Air Force Base, Camp Pendleton, North Island Naval Air Station, the San Diego Navy Base, and Seal Beach Naval Weapons Station. (Kaplan, New West; "Broken Arrow"; KQED.) The identification would seem to be accurate considering the large number of warheads that are acknowledged to exist and the widespread deployment of weapons systems that are acknowledged to be capable of carrying them.[1]

4. The nuclear capable launching devices to which the U.S. nuclear warheads are affixed (land-based missiles, submarine-based missiles, aircraft, naval vessels, artillery pieces), are described and illustrated in detail in numerous authoritative journals, including Ships and Aircraft of the U.S. Fleet (Naval Institute Press,

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1. The United States government itself has acknowledged the existence of 20,000 or more nuclear warheads and specified some of the weapons systems to which they are assigned. Thus, in Department of Defense Directive 5210.2 (Joint ERDA/DOD Nuclear Weapons Classification Guide), cited as Appendix H in Appellant's Petition for a Writ of Certiorari:

"Topic 1793...The statement that we

Annapolis, Md.); Aviation Week & Space Technology's annual "Aerospace Forecast & Inventory"; Defense and Foreign Affairs Handbook (Copley & Associates, Washington, DC); International Air Forces and Military Aircraft Directory (Stapleford, United Kingdom, Aviation Advisory Services);

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maintain a total number of nuclear warheads, tactical, as well as strategic, in the tens of thousans is unclassified.

"Topic 1754...The Fact that MINUTEMAN and TITAN and SAFEGUARDS Systems missiles in silos have nuclear warheads in place or that aircraft units in CONUS (Continental United States) known on an unclassified basis to be on nuclear alert have nuclear weapons in place is unclassified.

"Topic 1752...The fact that SSBN's (submarines) on patrol carry 16 missiles with nuclear warheads is unclassified.

"Topic 1771...Location of missile launchers and control centers per se are classified only if expressed more precisely than to the nearest minute in North America Datum System coordinates.

Jane's All the World's Aircraft (Macdonald & Co., London); Jane's Fighting Ships; Jane's Infantry Weapons; Jane's Weapons Systems; Jane's World Armored Fighting Vehicles; and "Military Aircraft of the World" and "Missile Forces of the World," published annually in Flight International (IPC Transport Press, London).

5. The home bases and home ports of these nuclear capable weapons systems are common knowledge or can be readily ascertained by visual observation.

The General Accounting Office has reported that there are more than 600 "nuclear capable units" where the military assembles, maintains and stores its nuclear weapons. ("Accountability and Control of Warheads in the Custody of the Department of Defense and the Energy Research and Development Administration," General Accounting Office, June, 1977.) From time to time nuclear weapons storage sites are explicitly identified by official sources in the ordinary course of business. Thus, the following listing appeared on October 31, 1975, in the Commerce Business Daily, U.S. Department of Commerce publication which lists government contracts being put out for bid:

"Nuclear weapons security at Plattsburg AFB, N.Y. Design for perimeter security lighting, area lighting, emergency power plant, auxiliary surveillance towers, hardening of new and existing surveillance control facility."

B. Even if the location of nuclear weapons storage sites were not a matter of common knowledge in the United States, the information is doubtless known to this nation's presumed adversaries.

The stipulation contained in the U.S. Soviet SALT-I agreement of May, 1972, that "for the purpose of providing assurance of compliance with the provisions (of the agreements) each party shall use technical means of verification at its disposal" rested on the express understanding that the two governments could locate and identify each other's nuclear weapons by means of reconnaissance satellites. (World Armaments and Disarmament, SIPRI Yearbook 1974, Stockholm International Peace Research Institute, Taylor & Francis, Ltd., London, 1974, page 287.) Similarly, the same capabilities were recognized by the SALT-II Treaty, signed in 1979, which provided for reciprocal

satellite verification of the numbers of nuclear weapons-bearing bombers, land-based missiles and submarine-launched missiles on each side.

The Soviet Union since October 31, 1968, has been launching maneuverable photo-reconnaissance satellites with close-look capabilities. At least 35 Soviet photo-reconnaissance satellites were launched in 1979. (SIPRI Yearbook, 1979, page 187.) Soviet equipment is said to match the capabilities of the U.S. Big Bird satellite, which, with a 20-foot focal length camera, can detect an Earth object the size of a coffee mug. At a Congressional hearing in 1973, Major General Edward B. Giller, U.S. Air Force Assistant General Manager for National Security, was asked if the Russians knew where U.S. nuclear weapons were stored. "Most of our stockpile sites have characteristic fence lines, lighting, and communications facilities," he answered. "I would imagine they know where most of them are." (Kaplan, New West, p. 81)

C. The refusal of responsible authorities to acknowledge what is in fact known to the general public or to the nation's presumed adversaries, or both, leaves the government and the public unprepared

to cope with potential dangers arising from the presence of nuclear weapons.

1. There have been many reported accidents involving nuclear weapons.

A 1976 survey listed 63 "serious accidents" involving nuclear weapons of the United States, United Kingdom, France, Soviet Union, and China from 1950 to 1973. (Lloyd J. Dumas, "National Insecurity in the Nuclear Age," Bulletin of the Atomic Scientists, May, 1976.) The Stockholm International Peace Research Institute has estimated 125 accidents, major and minor, involving nuclear weapons in the United States alone between 1945 and 1976. (SIPRI Yearbook, 1977)[2] The government itself has

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2. For example, on the night of September 14, 1977, a giant modified 707 U.S. Air Force jet (135) crashed into a mountain in the highly restricted Manzano Area, a storage facility for nuclear weapons, just after take-off from Kirkland AFB near Albuquerque, New Mexico. All 20 military personnel aboard were killed. The plane had just taken on 7,785 gallons of fuel, and it crashed only 1/2 mile from a bunker containing nuclear materials located 6 miles east from the end of the runway. Four Hills, a

acknowledged the possibility of serious accidents:

> Nuclear weapons are designed with great care to explode only when deliberately armed and fired. Nevertheless, there is always a possibility that, as a result of accidental circumstances, an explosion will take place inadvertently. Although all conceivable precautions are taken to prevent that, such accidents might occur in areas where weapons are assembled, or stored, during the course of loading and transportation, on the ground, or when actually in the delivery vehicle -- an airplane or missile. ("The Effects of Nuclear

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subdivision of Albuquerque, is one mile from the scene of the accident, and residents there were quoted by reports as saying that seconds after the crash, they expected the enormous flash of light to turn into a mushroom cloud. Some residents thought a nuclear weapon had exploded and were in shock. (The Albuquerque Tribune, September 15, 1977, p. 1, Cols. 1-4, p. A-4; Albuquerque Journal, September 16, 1977, page A-1, A-2; Honolulu Star Bulletin, September 15, 1977, p. A-14.)

Weapons," jointly published by the Atomic Energy Commission and Department of Defense.)

2. Such accidents can have grave consequences, even in the absence of detonation of the nuclear material itself.

A recent U.S. Army field manual states, for example, that:

> Detonation of the high-explosive component may pulverize plutonium into minute, invisible particles that are dispersed in smoke and dust which can cause contamination over a large area...Deposits of pulverized plutonium produced when an accident occurs may be resuspended by natural forces, such as the wind, or by personnel, vehicles and low-flying aircraft operating in the area. (Army field manual, "Nuclear Accident Contamination Control." FM 3-15, November 1975.)

It is well known that plutonium, a basic ingredient of nuclear weapons, is one of the most toxic and carcinogenic substances known to man. One millionth of a gram is sufficient to cause lung cancer 15 to 30 years after initial contact. When plutonium was scattered over a 640-acre area following the crash of a B-52 bomber and

destruction of two thermonuclear bombs over Palomares, Spain, on January 17, 1966, some 3.5 million pounds of radioactive soil and vegetation had to be removed. (Lloyd J. Dumas, Bulletin of the Atomic Scientists, May 1976, page 27.)

3. The evidence suggests that many communities in the United States are vulnerable to nuclear weapons accidents and ill-prepared to deal with their consequences.

At the Concord Naval Weapons Station at Concord, California, where weapons are known to be stored, an active earthquake fault lies a mile and a half away, public roads criss-cross the base, an airport is nearby, and an aqueduct passes within a few hundred yards of the weapons bunkers. ("Broken Arrow"; KQED transcript.) With respect to the Alameda Naval Air Station in Alameda, California, a television producer has stated:

> We have learned from Alameda base employees, including a Marine security guard, that nuclear weapons are not only off-loaded at the base, they are stored there as well. The presence of nuclear weapons so close to an air strip and a major population center raises serious public safety issues.

For instance, there is no evacuation plan for the immediate area, which includes downtown Oakland. (Stephen Talbot in "Broken Arrow"; KQED.)

Similarly, the Seal Beach Naval Weapons Station in Seal Beach, California, also believed to be a major storage site for nuclear weapons, is within 10 miles of 10 airports where there are 257,000 plane landings in an average year. Three planes have crashed on base property, one of them leaving a path of flaming jet fuel not far from the weapons storage bunkers. (Kaplan, New West, p. 82.)

D. By Petitioners' own admission, confirmation of the presence of nuclear weapons at a particular location is lawful under the Atomic Energy Act in some circumstances.

It is the firm policy of the U.S. Government to neither confirm nor deny the presence of nuclear weapons or components aboard any ship, station, or aircraft. The only exception is when such a confirmation or denial may be essential to public safety as to allay public alarm. (U.S. Navy Instruction SECNAVINST 5720.44 14 June 1974, emphasis added.)

As amici have argued above, the refusal of responsible authorities to acknowledge at least the possibility of the presence of nuclear weapons at a particular location leaves the government and the public unprepared to cope with potential dangers arising from their presence. Thus confirmation for purposes of preparing an Environmental Impact Statement would fall squarely within the public safety exception specified in SECNAVINST 5720.44.

E. Amici are concerned that Petitioners' refusal to prepare environmental impact statements for storage sites of nuclear weapons in reliance on their policy that they can neither confirm nor deny the presence of nuclear weapons at any particular location leaves no one to examine the potential hazards of stationing and storing nuclear weapons at sites located throughout the United States, some of which are close to major population centers and transportation routes.

Amici agree with Respondents that it is not ever necessary to confirm the presence of nuclear weapons at West Loch in order to comply with the mandates of NEPA since an EIS would merely examine the impacts of "potential" storage of nuclear weapons rather

than affirmatively state that such weapons are present. Nonetheless, the facts set forth above indicate that Petitioners' non-acknowledgement policy should be insufficient to shield them from compliance with the procedural mandate of NEPA. It should be clear that the danger to which this policy exposes the American public far outweighs whatever minute advantages it may present.

III

RESPONDENTS AND THE GENERAL PUBLIC HAVE A RIGHT TO THE REQUESTED INFORMATION BY VIRTUE OF THE PUBLIC POLICY EMBODIED IN NEPA, RECENT FEDERAL STATUTES AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. Wholly apart from the question as to what information regarding nuclear weapons storage is already in the public domain, the public has a right to information on the subject in order to enable its members to make informed decisions affecting their lives, liberty and their pursuit of happiness.

The legislative history of NEPA evidences the desire and need to establish "clear and open lines of communication between the Council [on Environmental Quality] and the

public. The Council should also consider the impact of its activities upon the educational system, together with ways and means of continuing the growing trend toward public enlightenment on and concern with the important environmental issues that we confront." (H. Rep. 90-378, 1969 U.S. Code Congressional and Administrative News 2751, 2758, emphasis added.)

This policy was codified in NEPA at 42 U.S.C. 4331(a) where Congress "declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments and other public and private organizations...to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." (emphasis added)

The increasing Congressional concern with providing information to the public about present and potential hazards in order to enable it to actively participate in governmental regulatory decisions is reflected in recent legislation enacted to protect the public from the multitude of risks inherent in an industrialized society. Congressional recognition of the high degree

of informed public participation that is essential in the control process is evident in the Pesticide Control Act, 7 U.S.C. 136 et seq.; the Solid Wastes Disposal Act, 42 U.S.C. 6901 et seq. and the Water Pollution Control Act, 33 U.S.C. 1251 et seq., all of which contain provisions requiring public participation and dissemination of information.

Behind this growing Congressional trend is a desire on the part of lawmakers to avoid what has become an all too common modern experience -- that of awakening one mroning to a newscast informing one that he or she has been living atop a chemical dump, that his or her water supply is contaminated with radon-emitting uranium tailings or that his or her air has been infected with bacteria released pursuant to Army experiments.

Russell E. Train, former Administrator of the E.P.A., addressed himself to this issue as follows:

> Most Americans had no idea, until relatively recently, that they were living so dangerously. They had no idea that when they went to work in the morning, or when they ate their breakfast---that when they did the

> things they had to do to earn a living and keep themselves alive and well--- that when they did things as ordinary, as innocent and as essential to life as eat, drink, breathe or touch, they could, in fact, be laying their lives on the line. They had no idea that, without their knowledge or consent, they were often engaging in a grim game of chemical roulette whose result they would not know until many years later. (Quoted in the legislative history of the Toxic Substances Control Act, Title 15, Section 2601, U.S. Code Congressional and Administrative News Vol. 4, 94th Cong. 1976, 2d session P.L. 49-469 at page 4493.)

It is interesting to note that as far back as 1954, when the amendments to the Atomic Energy Act were passed, this concern was made an express policy of the act. In its statement of policy regarding the dissemination and declassification of restricted data the Act states:

> The dissemination of scientific and technical information relating to atomic energy should be permitted and encouraged so as to provide that free interchange of ideas and criticism

which is essential to scientific and industrial progress and public understanding and to enlarge the fund of technical information. 42 U.S.C 2161(b)

B. The Fifth Amendment of the United States Constitution prohibits federal actions which deprive a person of life, liberty and the pursuit of happiness without due process of law.

1. Substantive Due Process: The Federal Government can neither take any action nor refrain from taking any action which deprives an individual or group of individuals from enjoying a constitutionally protected "liberty" interest.[3]

The "liberty" interest has been delineated in the context of matters affecting personal decisions such as family relationships, child-rearing and education. See Meyer v. Nebraska, 262 U.S. 390, 399 (1923). In

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3. The concept of "federal action" for Fifth Amendment purposes is determined in the same way as is "state action" for Fourteenth Amendment purposes. Public Utilities Commission v. Pollak, 343 U.S. 451 (1952); Simkins v. Moses H. Cone Memorial Hospital, 323 F. 2d 959 (en banc) (4th Cir. 1963) cert den. 376 U.S. 938 (1964).

Meyer v. Nebraska, the court held that the concept of liberty in the Fourteenth Amendment

> denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. (emphasis added)

Other cases have found the liberty interest in activities relating to marriage: Loving v. Virginia, 388 U.S. 1, 12 (1967); procreation: Skinner v. Oklahoma, 316 U.S. 535, 541-542 (1942); child rearing and education: Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

Meyer holds that the right to obtain information is a protected liberty under the due process clause of the U.S. Constitution. Respondents herein are denied access to useful information which would be contained in an Environmental Impact Statement. Such information is essential to make decisions

regarding the very same constitutionally protected rights as enunciated in Meyer, supra.

In addition to the right to obtain information to enable one to make informed decisions regarding fundamental personal questions, there is an emerging right of citizens to be protected in our natural and personal state of life and health, as noted in Environmental Defense Fund, Inc. v. Hoerner Waldorf Corp. 3 ELR 20794 (D. Mont. 1970).[4]

In EDF v. Hoerner Waldorf, supra, the court held:

> I have no difficulty in finding that the right to life and liberty and property are constitutionally protected. Indeed the Fifth and Fourteenth Amendments provide that these

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4. This interest has also been defined as the right "to live in an environment that preserves the unquantified amenities of life," Environmental Defense Fund, Inc. v. Corps of Engineers of the U.S. Army, 325 F. Supp. 728, 739 (E.D. Ark. 1970), and the right to a healthful environment, Pinckney v. Ohio EPA, 375 F. Supp. 309-310 (N.D. Ohio, 1974).

> rights may not be denied without due process of law, and surely a person's health is what, in a most significant degree, sustains life.
>
> So it seems to me that each of us is constitutionally protected in our natural and personal state of life and health...

In this light, Board of Regents v. Roth, 408 U.S. 564 (1972) is worthy of note:

> ...[A] weighing process has long been part of any determination of the form of hearing required in particular situations by procedural due process. But, to determine whether due process requirements apply in the first place, we must look not to the "weight" but to the nature of the interest at stake. (at 570-571)

Respondents and amici have demonstrated that Petitioners' reliance on the fearful consequences attending dissemination by an EIS of "restricted data" is misplaced. Weighed against the policy of recognizing a right to informed decision-making by the public on questions concerning health and safety, a right wholly dependent on the release of such information as required by case and statutory law, the Petitioners'

rationale must be found wanting.

> In the words of one court:
>
> No subject to be covered by an EIS can be more important than the potential effects of a federal program upon the health of human beings. (Citizens Against Toxic Sprays, Inc. v. Bergland, 428 F. Supp. 908, 927 (D.C. Ore. 1977))

2. Procedural Due Process: The interests that are protected by procedural due process are normally not created by the Constitution. They are created, and their dimensions defined, by an independent source such as statutory law. Goss v. Lopez, 419 U.S. 565, 572 (1975). The minimum that is constitutionally required is that deprivation of life, liberty or property is preceded by notice and opportunity to be heard. Boddie v. Connecticut, 401 U.S. 371, 378 (1971).

Under NEPA the public has a right to receive any "detailed statement" and the comments and views of the appropriate federal, state and local agencies. 42 U.S.C. §4332. The involvement of the public through NEPA in the decisions of federal agencies is delineated at 40 C.F.R. §1506.6. In addition, NEPA procedures must ensure that environmental information is available to public officials and citizens before

decisions are made and actions are taken. 40 C.F.R. §1501.4(b).

Further regulations promulgated pursuant to NEPA provide that to the fullest extent possible, federal agencies shall encourage and facilitate public involvement in decisions which affect the quality of the human environment. 40 C.F.R. §1500.2(a). (Additional regulations involving the public in the EIS process are found in 40 C.F.R. §1503.1(a)(4) and 1505.1(e), 1506.6(c)(1) and in Executive Order No. 11514, Section 2(b), March 5, 1970.)

In the instant case the public was not given vital information and was therefore unable to respond to the issues raised by the expanded storage of nuclear weapons at the West Loch facility. As the statements issued by the federal agencies were not site-specific, they were not detailed statements within NEPA's mandate.

The dimensions of Respondents' and the public's right to procedural due process in the factual situation presented by this case have been defined by NEPA and the regulations promulgated pursuant to it. Petitioners, by their actions in refusing to prepare and to disseminate an EIS, have denied them information and due process

rights to which they are entitled.

IV

CONCLUSION

The Petitioners point out that the logical imperative of preparing an EIS for every potential site of nuclear weapons storage would be "unsettling" and would give citizens a disconcertingly inflated impression of the amount of nuclear weaponry that surrounds them. (Petitioners' Brief, pp. 24-25.) Petitioners' concern is misplaced. Citizens must and do deal daily with the spectre of nuclear war and their vulnerability to nuclear attack or radioactive release. The premise that the public cannot be entrusted with basic facts concerning their own health and safety is a fundamentally unsettling notion. Contrary to Petitioners' view, ignorance is not bliss.

Amici therefore join with Respondents in urging that the ruling of the United States Court of Appeals for the Ninth Circuit be upheld and that the Petitioners be ordered to comply with the EIS provisions of the National Environmental Protection Act.

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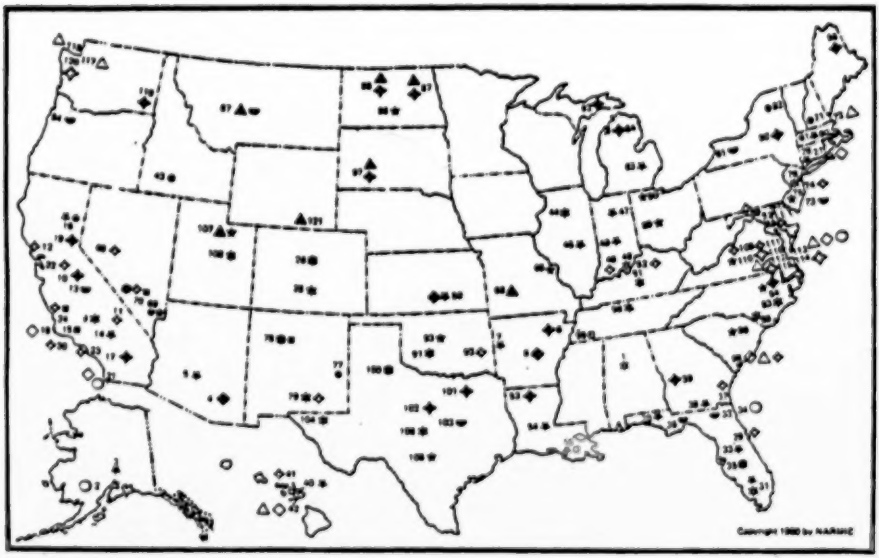
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* Respectfully submitted with the aid of Samuel Day of Madison, WI; Jolie Lipsig, Pamela Mickler, William M. Simpich, Jr. and Jonathan Soffer of San Francisco, CA, whose assistance is gratefully acknowledged.

EXHIBIT A

EXHIBIT: A

Nuclear Weapons Storage and Deployment Sites



ARMY
- arsenal, very likely storage
- training with nuclear capable weapons

NAVY
- nuclear capable surface ships
- nuclear attack submarine
- ballistic missile submarine
- nuclear capable ports
- testing/storage site

AIR FORCE
- MINUTEMAN II, III
- TITAN II, III
- B-52
- F-111 and FB-111
- F-101 and F-105
- other nuclear capable planes
- storage facility likely

DEPARTMENT OF ENERGY
- production, testing or storage

Information in this publication is from government, industry, and military sources, including House and Senate hearings, *Army* (magazine) and *Air Force* (magazine). Publications of the Stockholm International Peace Research Institute and the Center for Defense Information were also consulted.

The United States nuclear weapons arsenal consists of about 9,900 strategic and 20,000 tactical nuclear warheads and a variety of weapon systems capable of delivering them. At least 40 of the 50 states house bases or installations which either serve or could serve as nuclear weapons storage or deployment sites. These sites pose grave dangers for those living and working near them. They would be targeted for nuclear war; they are potential objects of sabotage, and they present health and safety hazards.

Either "strategic" or "tactical" nuclear weapons are located in the 121 sites identified. A "strategic" weapon is designed to knock out the warmaking capability of an enemy; "tactical" weapons are for "battlefield" use. The Pentagon's strategic nuclear weapons force is based on the "triad", a combination of land-based missiles, sea-based missiles, and manned bombers. Strategic nuclear weapons include the MINUTEMAN II & III, TITAN I & II MISSILES, B-52 and F-111 bombers, and POLARIS/POSEIDON submarines. New strategic weapons under development include the TRIDENT submarine, MX missile, and some types of the cruise missile. Tactical nuclear weapons include LANCE and PERSHING missiles, nuclear artillery (8 in. and 155 mm. nuclear howitzers), and nuclear land mines (SADM and MADM).

The bomb used on Hiroshima had a 13.5 kiloton yield. Today the U.S. arsenal possesses nuclear weapons ranging from "small" nuclear-tipped missiles of less than .05 kt to the TITAN II with a 5 megaton yield.

The Department of Defense and the Department of Energy oversee the development, construction, storage, and decommissioning of nuclear weapons. Many people have held positions in both departments, some simultaneously. James Schlesinger acted as Secretary of both DOE and DOD, and Charles W. Duncan, General Bratton, and Admiral Rickover have occupied key positions in both departments. The DOE is a civilian agency, and yet about 40% of its budget is weapons related. The DOE is responsible for research and development, production of weapons grade uranium and plutonium, security systems, transportation, and reprocessing of nuclear warheads. The DOD manages delivery systems, deployment, storage, security, and training of personnel in the use of nuclear weapons systems. When the DOD estimates the cost of a weapons system, it normally does not include the cost of warheads, which the DOE provides.

U.S. military policy prohibits either confirming or denying the presence of nuclear weapons. The shroud of secrecy surrounding the testing, production, and storage of nuclear weapons makes it difficult to verify the location of all sites. The protection of this immense stockpile of destruction requires constant surveillance, which cost more than $108,120,000 in FY 1978 alone. The weapons located in this country are potentially dangerous to the people living here, as well as to any potential enemy.

NUCLEAR WARHEADS CARRIED BY WEAPONS SYSTEMS

AIR FORCE	
B-52	"up to 20 Short Range Attack Missiles (SRAM) (nuclear warheads)...together with up to 4 Mk 28 weapons"
F-4 (C/D/E/F)	"provision for carrying...up to 16,000 lbs. of nuclear...bombs and missiles"
F-16	"air-to-air and air-to-surface munitions"
F-100 (C/D)	"underwing pylons for six 1,000 lb. bombs"
F-105 (D/B)	"more than 14,000 lbs. of stores under fuselage and wings"
F-106	"one AIR-2A Genie unguided nuclear warhead rocket"
F-111	"two nuclear bombs in internal weapons bay"
FB-111	"up to (six) AGM-69A SRAM air-to-surface missiles...or six nuclear bombs"
MINUTEMAN II	"LGM-30F single thermonuclear warhead"
MINUTEMAN III	"LGM-30G multiple thermonuclear warheads"
TITAN II	"thermonuclear (largest yield in U.S. nuclear arsenal)"
ARMY	
HONEST JOHN	(MGR-1B) "1 kiloton yield nuclear payload"
HOWITZER (8")	"will carry XM753 nuclear round now under development"
HOWITZER (155mm)	"can fire a nuclear projectile"
LANCE missile	"M234 nuclear warhead...1 kiloton yield"
NIKE-HERCULES	"designed to break up whole formations of aircraft with nuclear warheads"
NAVY	
A-7	"15,000 total weight (of armaments)"
Aircraft carriers (13)	carries 24 F-4's
Cruisers (28)	Anti-Submarine Rockets (ASROC)
Destroyers (72)	"1 8" tube ASROC launcher or ASROC anti-submarine warfare missiles"
Frigates (65)	ASROC
P-3 A/C	Anti-Submarine Torpedoes (ASTOR) missile
POLARIS/POSEIDON (submarine)	(31) TRIDENT missiles (10) ballistic missiles
Attack submarine (73)	Anti-Submarine Rocket Missile (SUBROC)

NUCLEAR WEAPONS STORAGE AND DEPLOYMENT SITES

State	Map Number	Installation—Location	Delivery Systems or Type of Facility
Alabama	1	Redstone Arsenal	Missile and munitions center and school
Alaska	2	Adak Naval Station	nuclear-capable Naval surface ships
	3	Elmendorf AFB	F-4
Arizona	4	Davis-Monthan AFB	TITAN II
	5	Luke AFB	F-4
Arkansas	6	Blytheville AFB	B-52
	7	Ft. Smith	F-100D
	8	Little Rock AFB	TITAN II
California	9	Angeles National Forest	Army 19th Artillery Weapons Storage
	10	Castle AFB	B-52
	11	China Lake NWS	Naval weapons station
	12	Concord NWS	Naval weapons station
	13	Fresno	F-106
	14	George AFB	F-4 C/E/G
	15	Los Angeles AFB	development, production, delivery of ballistic missiles
	16	McClellan AFB	F-111, FB-111, F-100, F-105
	17	Moron AFB	B-52
	18	Mare Island Naval Shipyard (Vallejo)	Five attack submarines
	19	Mather AFB	B-52
	20	Point Mugu NAS	Pacific missile test center
	21	San Diego Navy Base	three guided missile cruisers, twelve attack submarines
	22	San Francisco Bay Naval Shipyard	missile testing
	23	Seal Beach NWS	ASROC, SUBROC, TALOS (Naval weapons)
	24	Vandenberg AFB	ICBM test facilities (Navy and A.F.)
Colorado	25	Fort Carson	Army nuclear weapon storage
	26	Rocky Flats	plutonium triggers (part of warhead)
Connecticut	27	Groton/New London Naval Submarine Base (Thames River)	twenty attack subs, ballistic missile subs
	28	Windsor Locks	F-100
Florida	29	Cape Canaveral	TRIDENT testing
	30	Eglin AFB, Hulbert Field	F-4E
	31	Homestead AFB	F-4E, NIKE HERCULES
	32	Jacksonville AFS	F-106
	33	MacDill AFB	F-4D/E, F-16
	34	Mayport NS	nuclear-capable surface ships
	35	Pinellas	neutron devices
	36	Tyndal AFB	F-106; air defense weapons center
Georgia	37	King's Bay (Navy)	sub support base
	38	Moody AFB	F-4E, F-4
	39	Robins AFB	B-52
Hawaii	40	Hickam AFB	F-4
	41	Lualualei Naval Magazine	warheads for ballistic missile subs and attack subs
	42	Pearl Harbor Naval Submarine Base	14 attack subs, ten ballistic missile subs
Idaho	43	Mountain Home AFB	F-111A
Illinois	44	Rock Island Arsenal	Army munitions
	45	Springfield	F-4C
Indiana	46	Crane NWSC	naval weapons
	47	Ft. Wayne	F-4C
	48	Indiana AAP	155 mm howitzers, 8" howitzers
	49	Terre Haute	F-100D
Kansas	50	McConnell AFB	F-105, F-4, TITAN II
Kentucky	51	Louisville (Army National Guard) Corps Artillery	HONEST JOHN (MGR1B)
	52	Louisville Ordnance Station (Navy)	naval weapon
Louisiana	53	Barksdale AFB	B-52
	54	England AFB	A-7
	55	New Orleans NAS	F-100, F-4C
	56	Loring AFB	B-52
Maine	57	Andrews AFB	F-105D, F-4
Maryland	58	Indian Head Naval Ordnance Station	naval weapons
	59	White Oak Naval Surface Weapons Center	naval weapons
	60	Otis AFB	F-106
Massachusetts	61	Westfield	F-100D
	62	K.I. Sawyer AFB	B-52
Michigan	63	Selfridge ANGB	F-4C/D
	64	Wurtsmith AFB	B-52
	65	St. Louis	F-4C
Missouri	66	Whiteman AFB	MINUTEMAN II
	67	Malmstrom AFB (Great Falls)	F-106, MINUTEMAN II, III
Montana	68	Hawthorne Naval Ammunition Depot	naval weapons
Nevada	69	Nellis AFB	F-4D/E, F-111E/F, F-16
	70	Nevada Test Site	testing by DOE and all military branches
	71	Pease AFB	FB-111
New Hampshire	72	Portsmouth	ballistic missile subs
	73	Atlantic City	F-106
New Jersey	74	Earle Naval Weapons Station	naval weapons
	75	McGuire AFB	F-105B
	76	Picatinny Arsenal	radiological testing of weapons
	77	Cannon AFB	F-111D
New Mexico	78	Kirtland AFB (Manzano)	nuclear weapons laboratory storage of "obsolete" weapons
	79	White Sands Missile Range	missile testing
	80	Griffiss AFB	B-52
New York	81	Niagara Falls International Airport	F-101
	82	Plattsburgh AFB	FB-111

State	Map Number	Installation—Location	Delivery Systems or Type of Facility
North Carolina	83	Fort Bragg (Fayetteville)	Army munitions
	84	Seymour-Johnson AFB	F-4F, B-52
	85	Sunny Point Military Ocean Terminal	ammunition shipping point
North Dakota	86	Fargo	F-4C/D
	87	Grand Forks AFB	B-52, MINUTEMAN III
	88	Minot AFB	B-52, MINUTEMAN III
Ohio	89	Springfield	F-100, A-7
	90	Toledo	F-100D
Oklahoma	91	Ft. Sill	LANCE missiles
	92	McAlester Naval Ammunition Depot	Naval weapons
	93	Tinker AFB	F-105D/F
Oregon	94	Portland (ANG)	F-101
South Carolina	95	Charleston Fleet Ballistic Missile Submarine Center	five attack subs, POLARIS subs, ballistic missile subs (also will have TRIDENT)
	96	Shaw AFB	F-4, F-4D
South Dakota	97	Ellsworth AFB	B-52, MINUTEMAN II
Tennessee	98	Clarksville (Army)	Army munitions
	99	Memphis NAS	nine P-3A's
Texas	100	Amarillo (Pantex)	(DOE) final assembly of nuclear weapons
	101	Carswell AFB	B-52
	102	Dyess AFB	B-52
	103	Ellington AFB (ANG)	F-101
	104	Ft. Bliss	NIKE HERCULES
	105	Kelly AFB	F-4C
	106	Killeen	Defense Atomic Support (weapons storage)
Utah	107	Hill AFB	MINUTEMAN silo, F-4D, F-16, F-105B
	108	Salt Lake City (Army National Guard) Field Artillery Unit	HONEST JOHN unguided artillery rocket
Virginia	109	Advanced Undersea Weapons Compound (exact location not known)	storage of naval nuclear weapons
	110	Byrd Field (Sandston)	F-105D
	111	Dahlgren Navy Surface Weapons Lab	Navy weapons storage
	112	Newport News	ballistic missile submarine
	113	Norfolk Naval Station	ballistic missile, attack, POLARIS subs and nuclear capable surface ships
	114	(Oceana NAS) Virginia Beach	Navy weapons storage, testing of MK 88, MOD-1
	115	St Juliens Cr. NWS	Navy weapons storage
	116	Yorktown NWS	Navy weapons storage
Washington	117	Bangor	TRIDENT
	118	Bremerton Polaris Missile Facility	POLARIS, POSEIDON
	119	Fairchild AFB	B-52
	120	Keyport Torpedo Station	torpedos
Wyoming	121	F.E. Warren AFB	MINUTEMAN III

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IN THE
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Amicus Curiae Brief of Natural Resources Defense Council, Inc., Sierra Club, Environmental Action Foundation, And Friends of the Earth In Support of Respondents

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INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, the Natural Resources Defense Council, Inc. (NRDC), the Sierra Club, the Environmental Action Foundation, and Friends of the Earth respectfully submit this amicus curiae brief in support of Respondents. Consent to the filing of this brief has been granted by counsel for both parties. Copies of these letters of consent have been filed with the Clerk of this Court.

NRDC is a national, non-profit public interest legal and scientific organization dedicated to the wise management of natural resources and the achievement of environmental quality. NRDC acts to protect the interests of its approximately

31,000 contributing members in the United States and abroad. Among NRDC's membership are 207 members residing in the state of Hawaii, whose health and environment may be directly affected by the possible storage of nuclear weapons at West Loch.

The Sierra Club is a national, non-profit conservation organization of more than 200,000 members, of whom approximately 1,147 are members of the Hawaii chapter. The Sierra Club was organized to study, protect, enhance, and enjoy natural resources and promote a safe and healthy environment. The Sierra Club is concerned that the failure to prepare an environmental impact statement on the potential storage of nuclear weapons at the West Loch facility could result in substantial impacts to the environment and to the health and safety of members of the Sierra Club, particularly its Hawaii chapter.

The Environmental Action Foundation is a national, non-profit environmental organization that was founded by the organizers of Earth Day in 1970 to act as a national information clearinghouse on various environmental issues. The Environmental Action Foundation wishes to ensure that the citizens using its information services, particularly those residing in Hawaii, have access to as much information as possible concerning the environmental impacts of the West Loch facility.

Friends of the Earth (F.O.E.) is a non-profit public interest organization committed to the preservation, restoration and rational use of the ecosphere. F.O.E. has approximately 23,000 members in the U.S., offices in 12 U.S. cities, and sister Friends of the Earth groups in 23 countries worldwide. Approximately 171 members are residents of the state of Hawaii. F.O.E. has since its founding been concerned about the hazards of nuclear technologies, and has worked extensively on nuclear power, nuclear proliferation, and related issues.

SUMMARY OF ARGUMENT

This action raises the question whether the Department of the Navy must prepare an environmental impact statement (EIS) for an 1,800-acre weapons storage facility near Pearl

Harbor on the island of Oahu, Hawaii. The "West Loch" storage facility is sited approximately one mile from the landing flight path of Honolulu International Airport, located near an expanding population center, and has been specially constructed to be capable of storing nuclear weapons. The Ninth Circuit Court of Appeals held that, under the National Environmental Policy Act, 42 U.S.C. (& Supp. III) § 4321 *et seq.* (NEPA) the Navy must prepare an environmental impact statement for the storage facility. In finding that an EIS is required, the Court of Appeals was not engaging in any novel or creative interpretation of NEPA. The Court merely recognized that, if the Navy publicly discloses its proposal to build and operate a facility capable of storing nuclear weapons, it must be considering the possibility at some point in the future of using the facility in such a manner. Nuclear weapons storage then becomes one of the "reasonable alteratives" (or as the Court of Appeals labelled them, "hypotheticals"), which NEPA requires to be discussed in an EIS.

Apart from whether the Navy must prepare an EIS on West Loch is the issue of whether and to what extent the EIS once completed must be disclosed to the public. Contrary to Petitioners' assertions, NEPA does not require the Navy to disclose to the public any information in an EIS on West Loch which is required by statute or executive order to be withheld. The Navy does have an obligation under NEPA to inform the public to the fullest extent possible about the possible environmental hazards associated with its activities, consistent with the need to protect national security information.

The Navy must make available to the public all reasonably segregable unclassified portions of the EIS. Compliance with NEPA's disclosure requirement cannot be evaded simply on the basis of a prior unsubstantiated judgment that the unclassified parts of the EIS would be too general or abstract to be of value to the public.

A substantial amount of data concerning the storage of nuclear weapons is already unclassified and in the public record, as evidenced in part by the Navy's publication of a generic EIS on nuclear weapons storage. Sufficient unclassified

information exists to permit the Navy to prepare, and make publicly available, a comprehensible and useful EIS on West Loch discussing the four critically important environmental factors which the Court of Appeals ruled must be addressed.

ARGUMENT

I. THE NAVY VIOLATED THE NATIONAL ENVIRONMENTAL POLICY ACT BY FAILING TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT FOR THE WEST LOCH WEAPONS STORAGE FACILITY

The crucial question before this Court is whether the Department of the Navy violated the National Environmental Policy Act (42 U.S.C. (& Supp. III) § 4321 *et seq.*) (NEPA) by failing to prepare an environmental impact statement (EIS) regarding the construction and use of the "nuclear-capable" West Loch weapons storage facility.

The passage of NEPA resulted from Congressional concern about the serious deterioration of environmental quality and desire to make protection of the environment the mandate of every federal agency.[1] While NEPA sets out a number of substantive goals for environmental protection,[2] its requirements, as recognized by this Court, are "essentially procedural."[3] At the heart of NEPA lies Section 102(2)(C), which this Court has described as:

> one of the "action-forcing" provisions intended as a directive to "all agencies to assure consideration of the environmental impact of their actions in decision-making."[4]

---

[1] *See* S. Rep. No. 91-296, 91st Cong., 1st Sess. 5 (1969).

[2] These goals include the attainment of "the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences." 42 U.S.C. § 4331.

[3] *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227 (1980).

[4] *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976) (*citing* Conference Report on NEPA, 115 Cong. Rec. 40416 (Dec. 20, 1969) (Senate)).

Section 102(2)(C) specifies, in pertinent part, that:

> [A]ll agencies of the Federal Government shall—
>
> * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) The environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action. . . .[5]

This Court has described the obligation of federal agencies to prepare EISs pursuant to the requirements of Section 102(2)(C) as follows:

> [T]he statute clearly states when an impact statement is required, and mentions nothing about a balancing of factors . . . . The procedural duty imposed upon agencies by this section is quite precise, and the role of the courts in enforcing that duty is similarly precise.[6]

A. The West Loch Facility is a Major Federal Action Significantly Affecting the Quality of the Human Environment and Therefore Requires an Environmental Impact Statement

Petitioners admit that NEPA applies to the Navy and to its weapons storage activities.[7] The first question this Court must decide is whether the Court of Appeals and District Court below were correct in their holdings that the West Loch project is a "major Federal action significantly affecting the quality of

[5] 42 U.S.C. § 4332(2)(C).

[6] *Kleppe v. Sierra Club, supra* n. 4, at 405-06.

[7] Brief for Petitioners, at 12.

the human environment."[8] The regulations of the Department of the Navy provide criteria to be used in deciding whether a proposed action falls within this category.[9] They include the "potential for threat or hazard to the public," and the "potential for significant degradation of environmental quality."[10]

The West Loch storage facility consists of 48 weapons storage magazines and associated security facilities encompassing some 1,800 acres and costing over eight million dollars to construct.[11] Petitioners admit that the West Loch facility was specifically designed and constructed in order to be capable of storing nuclear weapons.[12] The District Court found that the West Loch storage facility is within the traffic area of Honolulu International Airport and approximately one mile from the landing flight path for flights from the continental United States and elsewhere.[13] Two other military airports are also located within five miles of West Loch.[14] The District Court found that the Federal Aviation Administration has not established a prohibited flight zone over the West Loch area.[15] The West Loch facility is located in the Pearl Harbor area of Oahu, which is within ten miles of downtown Honolulu, and is the area experiencing the most rapid population growth on the island.[16] If an airplane crashed into a magazine storing nuclear weapons at West Loch, the result might be a nuclear explosion and radioactive fallout seriously damaging the health of thousands of people living nearby, as well as the environment.[17]

In accordance with its regulations implementing NEPA,[18] the Navy prepared a brief, classified Environmental Impact Assessment (EIA) in order to determine whether or not an EIS

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[8] Petition for a Writ of Certiorari [hereinafter cited as "Petition for Cert."], at 3a, 14a.

[9] 46 Fed. Reg. 22,892 (Apr. 22, 1981).

[10] Id. at p. 22,894 (to be codified at 32 C.F.R. § 775.6).

[11] Petition for Cert, at 12a, 18a.

[12] Joint Appendix, at 18.

[13] Petition for Cert., at 13a.

[14] Joint Appendix, at 62.

[15] Petition for Cert., at 13a.

[16] Joint Appendix, at 55, 74-75.

[17] Joint Appendix, at 54-57.

[18] 46 Fed. Reg. 22,892, 22,894 (Apr. 22, 1981).

on the West Loch facility would be required. Every EIA must consider all reasonably foreseeable consequences of the proposed action, as well as all reasonable alternatives and their potential impacts.[19] The unclassified portion of the EIA on West Loch discusses the environmental impacts of the construction of the facility and its use for the storage of non-nuclear weapons. The EIA, however, omits any reference to the unclassified fact that the facility was made capable of storing nuclear weapons. This fact alone makes it obvious that the Navy is considering such storage as a reasonable alternative future use of the facility. Had the Navy evaluated this alternative, it would have reached the same conclusion as the Courts below that the West Loch project is "a major Federal action significantly affecting the quality of the human environment."

This conclusion is buttressed by the subsequent preparation by the Navy of a generic Candidate Environmental Impact Statement (CEIS) on nuclear weapons storage. However, the CEIS, which discusses to a limited extent some of the impacts of nuclear weapons storage, is inadequate for purposes of the West Loch facility. The CEIS does not discuss the potential harm resulting from airplane crashes into the nuclear weapons storage magazines nor the environmental impacts specific to West Loch.[20] These omissions evidence a lack of full compliance with NEPA regarding the West Loch facility, and prompted the Court of Appeals to hold that:

> [The district court] erred in holding that the Navy has complied with NEPA to the fullest extent possible. We conclude that the EIA and the CEIS provided by the Navy are inadequate and that an EIS is required under the provisions of NEPA.[21]

Sensitive to the Navy's policy of neither confirming nor denying the presence of nuclear weapons at any particular site, the Court of Appeals ordered the Navy to prepare a

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[19] 40 C.F.R. § 1508.9 (NEPA regulations of the Council on Environmental Quality).

[20] Petition for Cert., at 27a-35a.

[21] *Id.* at 7a.

"hypothetical" EIS on West Loch. At first glance, this may appear to be a novel or creative interpretation of NEPA. In fact, all EISs are "hypothetical" since they involve a proposed action and reasonable alternatives thereto which may or may not be taken at some point in the future.

B. The Navy Is Not Relieved From Its Obligation To Prepare an Environmental Impact Statement on the West Loch Facility Because of the Nature of Nuclear Weapons Storage

Petitioners apparently argue that the Navy need not even prepare an EIS because most of the information contained in the statement could not be publicly disclosed, including whether or not nuclear weapons are actually being stored at West Loch. The obligation to prepare an EIS, however, is completely independent from any requirement for its release to the public. Assuming *arguendo* that the Navy could not disclose a single word of the EIS, it is not discharged from its obligation to prepare the statement. There is no "national defense" exemption to NEPA,[22] and the Navy's own regulations state that:

> The fact that a proposed action is of a classified nature does not relieve the proponent of the action from complying with the NEPA.[23]

The need for an EIS, even one that is totally classified, exists because a major purpose of NEPA is to ensure that agency decisionmakers consider the environmental consequences of their proposed actions and that their decisions are "fully informed and well-considered."[24] The regulations of the Council on Environmental Quality, implementing the procedural provisions of NEPA, state that:

> An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant materials to plan actions and make decisions.[25]

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[22] *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 823 (D.C.Cir. 1977).

[23] 46 Fed. Reg. 22,892, 22,894 (Apr. 22, 1981).

[24] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978).

[25] 40 C.F.R. § 1502.1.

Petitioners also claim that if the Navy is required to prepare an EIS on West Loch, it would be obligated to prepare an EIS for every nuclear weapons storage facility, which would unlawfully confirm the presence of nuclear weapons at these sites.[26] In order to avoid this result, the Navy would be forced at great administrative cost to prepare EISs on every facility capable or perceived to be capable of storing nuclear weapons.[27] Yet neither compliance with NEPA nor the need to protect military secrets compels the Navy to adopt this course of action. The need for an EIS on West Loch is triggered by the proposal for large-scale construction of new nuclear-capable weapons storage magazines at the site.

The Navy need not prepare an EIS for other existing nuclear weapons-capable storage sites unless there is a proposal to modify them in a manner constituting "a major Federal action significantly affecting the quality of the human environment."[28] The Navy's failure to prepare EISs for these facilities, or to admit having done so, reveals only that no major modifications are planned. It does not reveal whether or not nuclear weapons are or may be stored at any particular site.

The Navy itself admits that little or no modification of existing facilities is now planned. The CEIS states:

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[26] *See* Brief for Petitioners, at 17.

[27] Brief for Petitioners, at 24. It should be noted that the Departments of Defense and Energy have prepared numerous EISs on nuclear weapons activities and facilities, such as the Rocky Flats Plant, which manufactures the plutonium components of U.S. nuclear weapons (FEIS, No. DOE/EIS-0064 (Apr. 1980)) and the Nevada Test Site for nuclear weapons (FEIS, No. ERDA-155)(Sept. 1977)). Although these actions are much more critical to our national defense than storage depots, the government has never argued that they are exempted from NEPA simply because EISs on these facilities could provide a "road map" of our defense system.

[28] NEPA does not apply to any Federal actions completed prior to the Act's passage. *See Sworob v. Harris*, 451 F. Supp. 96, 103 (E.D.Pa. 1978), *aff'd without opinion*, 578 F.2d 1376 (3d Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979). For many actions completed subsequent to that time, the Navy is protected from the impact statement requirement by the doctrine of laches. *See, e.g., Environmental Defense Fund v. Alexander*, 614 F.2d 474 (5th Cir. 1980).

> As it is expected that storage sites noted will remain essentially as presently configured, there are no proposed "actions" that affect either the objectives [or] specific terms of approved or proposed federal, state or local land use plans, policies or controls.

Petition for Cert., at 30a. It is very questionable whether the preparation of an EIS on West Loch would force the preparation of even a single additional impact statement. In any event, the fact that the preparation of EISs would be burdensome or costly has never been held to excuse an agency from NEPA compliance. *See, e.g., Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission,* 449 F.2d 1109, 1115 (D.C.Cir. 1971).

Even though the Navy cannot confirm whether it has decided to store nuclear weapons at West Loch, an EIS, even a totally classified one, is required and would be of great benefit to the Navy at this early stage in determining how to avoid or mitigate the hazards of such storage should the need arise.[29] Without an EIS, the Navy would not be forced to give careful and full consideration to these matters. In the pursuit of national security objectives, the Federal Government must not be allowed to ignore the potential for serious and undue harm to the American public resulting from military activities within the borders of the United States.

Petitioners are requesting this Court to rule that the Navy need not prepare an EIS because it would be impossible for the Navy to reveal any information which an EIS on West Loch would contain. The Court, however, should not be asked to rule on the theoretical impossibility of disclosure until an actual impact statement has been prepared, and a controversy has arisen over the question of disclosure. The Court cannot decide

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[29] As stated in *Calvert Cliffs' Coordinating Committee, supra:*

> Compliance to the "fullest" possible extent would seem to demand that environmental issues be considered at every important stage in the decision making process concerning a particular action — at every stage where . . . alterations might be made in the proposed action to minimize environmental costs.

449 F.2d at 1118.

these questions of law outside the context of specific factual situations.[30] Irrespective of the question of public disclosure, the Navy has an obligation to prepare an EIS. The Court should therefore require the Navy to prepare an EIS and, as discussed below, to comply with NEPA's disclosure requirements "to the fullest extent possible."

II. NEPA DOES NOT REQUIRE THE NAVY TO DISCLOSE ANY INFORMATION IN AN EIS ON THE WEST LOCH WEAPONS STORAGE FACILITY WHICH IS REQUIRED BY STATUTE OR EXECUTIVE ORDER TO BE WITHHELD. THE NAVY MUST MAKE AVAILABLE TO THE PUBLIC ALL REASONABLY SEGREGABLE UNCLASSIFIED PORTIONS OF THE EIS

Petitioners attempt to portray the case before this Court as involving an "irreconcilable conflict" between NEPA's requirement that an EIS be disclosed to the public and the Navy's statutory obligations to protect classified information. In fact, NEPA, the Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, the Atomic Energy Act of 1946, as amended, 42 U.S.C. (& Supp. III) § 2011 *et seq.*, and Executive Order No. 12065 on "National Security Information," 3 C.F.R. at 190, contain interlocking disclosure requirements, which reflect a common policy in favor of public disclosure to the fullest extent possible consistent with the protection of national security. These legal requirements dovetail to oblige the Navy to make available to the public all reasonably segregable unclassified portions of the required EIS.

Contrary to the assertions of Petitioners, the preparation of an EIS on West Loch pursuant to NEPA would not force the Navy to reveal information which otherwise may not be disclosed. Section 102(2)(C) of NEPA states that:

> Copies of such [environmental impact] statements . . . shall be made available to the President, the Council on Environmental Quality and to the

[30] *See, e.g., Rizzo v. Goode*, 423 U.S. 362 (1976).

> public as provided by section 552 of Title 5 [the Freedom of Information Act] . . . .[31]

The Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, explicitly does not require the release of any information specifically exempted from disclosure by statute or authorized to be kept secret by Executive Order in the interest of national defense or foreign policy. The Navy thus would not be required by NEPA to disclose in an EIS on nuclear weapons storage at West Loch information which is "Restricted Data" under the Atomic Energy Act[32] or properly classified under Executive Order No. 12065, "National Security Information."[33]

The Navy must make every reasonable effort in preparing an EIS to segregate classified information from unclassified information in order to disclose the unclassified portions to the public. The Navy's regulations implementing NEPA state that:

> [T]he EIS . . . shall be prepared, safeguarded and disseminated in accordance with the requirements applicable to classified information. When feasible, these documents *shall* be organized in such a manner that classified portions are included as annexes so that the unclassified portions can be made available to the public.[34]

The Freedom of Information Act, which governs the disclosure of EISs, similarly requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."[35]

This obligation exists even if the Navy believes that the unclassified portion of the EIS would be inconclusive, abstract, or even unsettling. It is not within the Navy's discretion to exempt itself from NEPA compliance simply on the basis of a

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[31] 42 U.S.C. § 4332(2)(C).

[32] 42 U.S.C. § 2014, 2161. *See* Section III(A) *infra.*

[33] 3 C.F.R. at 190 (June 28, 1978).

[34] 46 Fed. Reg. 22,892, 22,894 (Apr. 22, 1981)(emphasis added).

[35] 5 U.S.C. § 552(b).

prior unsubstantiated judgment that the release of unclassified information in the EIS would not prove useful to the public.

The desire of the Navy here to foreclose public access to information about activities at West Loch which may present significant dangers to the general public contradicts Defense Department regulations requiring the Navy to "facilitate the flow of unclassified information about DoD operations to the public,"[36] and to make readily available to the public all information not specifically exempt from disclosure, in order to "promote public trust."[37] As the Court of Appeals recognized, an EIS is one vehicle for assuring that governmental agencies are accountable to the electorate for their activities.[38] Although a governmental action may relate to national defense and the disclosure of information in an EIS may engender controversy, these considerations, which are present in the case at hand, do not outweigh the critical importance of public discussion and debate in a democratic society.

III. THE NAVY CAN PREPARE AND PUBLICLY DISSEMINATE PORTIONS OF AN EIS ON WEST LOCH WHICH WOULD BE COMPREHENSIBLE AND USEFUL SINCE MUCH INFORMATION RELEVANT TO NUCLEAR WEAPONS STORAGE IS ALREADY UNCLASSIFIED

Petitioners claim that if the Navy were to prepare an EIS on the West Loch facility, virtually every portion would consist of Restricted Data, classified information, or "inextricably intertwined" unclassified material, and therefore could not be revealed in a meaningful form to the public. Petitioners obscure the critical fact that a substantial amount of information relating to nuclear weapons storage is already in the public record and that the Navy could declassify more such information if it would be in the public interest. The Navy could prepare an EIS on West Loch whose publicly available portion

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[36] 32 C.F.R. § 159.3(a).

[37] Dod Freedom of Information Act Program, 32 C.F.R. Part 286.

[38] Petition for Cert., at 6a-7a. *See also, Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 788 (D.C.Cir.), *application for injunction denied*, 404 U.S. 917 (1971).

would provide a comprehensible and useful discussion of the four critical environmental issues identified by the Court of Appeals.

A. Substantial Information Concerning the Design, Manufacture, or Utilization of Atomic Weapons Is No Longer Prohibited From Disclosure by the Atomic Energy Act

Petitioners incorrectly assert that virtually all of the information in an EIS on nuclear weapons storage at West Loch would involve Restricted Data which is prohibited from disclosure by Section 224 of the Atomic Energy Act of 1946, as amended, 42 U.S.C. § 2164. "Restricted Data" is defined by the Atomic Energy Act as all data concerning the "design, manufacture or utilization of atomic weapons,"[39] but specifically excludes all information subsequently removed from the Restricted Data category. Since passage of the Act, the Departments of Defense and Energy have jointly determined that a substantial amount of Restricted Data could be "published without constituting an unreasonable risk to the common defense and security"[40] or could "be adequately safeguarded as defense information."[41] The Departments therefore transferred this information to the category of "Formerly Restricted Data," and the absolute bar to its disclosure in the Atomic Energy Act no longer applies.[42]

Formerly Restricted Data becomes subject to the same safeguards afforded to other defense information; namely, those in Executive Order No. 12065, "National Security Information," (3 C.F.R. at 190) and the DoD Information Security Program (32 C.F.R. Part 159). These security provisions reflect a strong policy against overclassification and in favor of public release of all information and segments of documents not specifically classified.[43] The Department of Defense has a responsibility and obligation to declassify information when the

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[39] 42 U.S.C. § 2014(y).

[40] 42 U.S.C. § 2162(c).

[41] 42 U.S.C. § 2162(d).

[42] *Id.*

[43] Exec. Order No. 12065, §§ 1-101, 1-504, 1-604, 1-605, 3 C.F.R. at 191-195.

public interest in disclosure outweighs the potential damage to national security. Exec. Order No. 12065, § 3-303, 3 C.F.R. at 197. Much of this Formerly Restricted Data has in fact been declassified altogether.[44]

Petitioners argue that:

> [W]ere an EIS to hypothesize that a particular facility might store nuclear warheads of type A, that hypothesis would reveal that somewhere in our nuclear arsenal there exists weapons of type A.[45]

The Navy fails to admit that information characterizing the types of existing U.S. nuclear weapons is not classified, even if the total number of weapons of a given type in the stockpile or the number at a specified location is classified information. The Fiscal Year 1982 Arms Control Impact Statements prepared by the U.S. Arms Control and Disarmament Agency identify the twenty-four nuclear weapon types in the U.S. stockpile and military systems used to deliver these weapons.[46] For some weapons, such as the B-61 bomb, the physical size of the weapons is unclassified, and, in fact, a number of nuclear weapon models are on display at the Department of Energy Museum in Albuquerque, New Mexico.[47] The types of safety and security features of some warheads are also unclassified.[48]

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[44] See Joint ERDA/DOD Nuclear Weapons Classification Guide, CG-W-4 (Petition for Cert., at 36a-45a).

[45] Brief for Petitioners, at 23.

[46] U.S. Arms Control & Disarmament Agency, *Fiscal Year 1982 Arms Control Impact Statements.* These systems include missile, artillery shell, gravity bomb, or atomic demolition. *See also* Proposed Energy and Water Development Appropriations for 1982: Hearings before the House Subcomm. on Energy and Water Development, 97th Cong., 1st Sess. at 106-10 (March 3, 1981) (statement of Robert L. Morgan).

[47] Letter from Lynnie Grace, U.S. Dept. of Energy, to Dr. Thomas B. Cochran, Natural Resources Defense Council, Inc. (March 30, 1981).

[48] *See, e.g.,* U.S. Arms Control & Disarmament Agency, *Fiscal Year 1981 Arms Control Impact Statements.*

Information on the types of nuclear weapons used by each branch of the armed forces and their modes of deployment is available to the public.[49] For example, the Navy has released a document which lists the types, dimensions, and weights of nuclear weapons which are stored aboard Navy ships.[50]

This unclassified information would enable the public to understand the kinds of nuclear weapons which might be stored at West Loch, and the general nature of their incorporated safety features. This information is not "inextricably intertwined" with Restricted Data or classified information.

The public disclosure by the Navy of its CEIS demonstrates that not all information concerning nuclear weapons storage is Restricted Data or classified defense information. The CEIS discusses the possibility of a nuclear accident and its impacts, the risks of low-level radiation escaping from a storage site, and relevant design and safety considerations.[51] Although, as noted above, the CEIS is not adequate either as a generic impact statement or a site-specific statement of the type required for West Loch, its very existence indicates that publication of portions of an EIS for West Loch is feasible.

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[49] U.S. Dept. of Defense, Report of Secretary of Defense Harold Brown to the Congress on the FY 1982 Budget, FY 1983 Authorization Request, and FYS 1982-1986 Defense Programs, at 109-130 (Jan. 19, 1981)(measures to improve the safety and security of theater nuclear forces); Organization of the Joint Chiefs of Staff, Supplement to *United States Military Posture for FY 1982*, 69-71, 75-79. For example, the B-61 bomb is usable on any U.S. aircraft that can deliver a nuclear bomb. Proposed Energy and Water Development Appropriations for 1980: Hearings before the House Subcomm. on Energy and Water Development, 96th Cong., 1st Sess., at 2655 (March 19, 1979)(statement of General Joseph K. Bratton). Such nuclear-capable aircraft include the A-4, A-6, A-7, F-4, and F-14 (primarily carrier-based) used by the Navy. Supplement to *United States Military Posture for FY 1982, supra*, at 76-77 and 88.

[50] Dept. of the Navy, *Loading and Underway Replenishment of Nuclear Weapons*, NWP 14-1 (Rev. A), at 1-7, 1-8 (1979).

[51] Petition for Cert., at 27a-35a.

B. Considerable Unclassified Information Exists To Enable the Navy To Discuss Publicly in an EIS on West Loch the Environmental Impacts of Storing Nuclear Weapons Without Revealing Classified Information

The Court of Appeals held that the Navy's impact statement should discuss four "critically important" environmental factors as they relate to the West Loch facility: the risk of nuclear accidents, the enhancement of that risk by the physical proximity of the airports, the effects of any nuclear accident upon the surrounding population and environment of Hawaii, and the effects of continual low-level radiation from the storage of the weapons near populated areas. Petition for Cert., at 3a. The Navy can discuss these four factors in considerable detail simply by using information found in unclassified, publicly available documents. This discussion, as the Court of Appeals recognized, would prove immensely valuable in informing nearby residents and other concerned members of the public, and would not reveal any Restricted Data or classified information.

(1) The Risk of Nuclear Accidents

The Navy asserts in the CEIS that the risk of a nuclear accident in a weapons storage facility is zero,[52] and implies in the Brief for the Petitioners that it is not feasible to have a meaningful discussion of the risks.[53] Neither of these assertions is true. The first statement would be true only if the nuclear components (i.e. the fissile uranium and/or plutonium) of all nuclear weapons used, stored, or ferried by the U.S. Navy were physically separated from the high explosive material and inserted into the weapon at the last minute. The Defense Department has stated that "[w]ith some early models of

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[52] The CEIS states:

> [T]he design and structure of nuclear weapons will not permit an accidental nuclear explosion or a nuclear contribution to the explosion of conventional explosives. This statement is applicable to both normal and abnormal situations. Petition for Cert., at 30a-31a.

[53] Brief for Petitioners, at 21-23.

nuclear weapons, it was standard procedure during *most* operations to keep a capsule of nuclear material separate from the weapon for safety purposes."[54] This procedure was abandoned in the late 1950s.[55] More modern designs incorporate safety features which reduce but do not eliminate the possibility of a nuclear explosion. Major General William W. Hoover, Director of Office of Military Applications, Department of Energy recently stated that:

> [G]iven that nuclear weapons exist and can be exposed to severe accident/incident situations, there is a small but non-zero probability that some undesirable consequences could occur, the most unlikely, but most far-reaching situation, should it occur, is a nuclear explosion.[56]

Nuclear weapons accidents in this sense are similar to nuclear reactor accidents. The probability of a catastrophic accident may be very small, but the potential harm would be very serious.[57]

The fact that nuclear weapons can be detonated accidentally is evidenced by the current regulations of the Department of Energy (DOE) for the transportation of nuclear weapons.[58]

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[54] U.S. Dept. of Defense, *Narrative Summaries of Accidents Involving U.S. Nuclear Weapons, 1950-1980,* at ii (Current as of April, 1981) (emphasis added.)

[55] *See* U.S. Depts. of Defense and Energy, "History of Nuclear Weapons Control" in *Long Range Nuclear Weapon Planning Analysis,* Annex 2 to Appendix A, pp. A-2-3 to A-2-7 (July 15, 1980).

[56] Proposed Dept. of Energy Authorization Legislation (National Security Programs) for Fiscal Year 1982: Hearings on H.R. 2969 before the Subcomm. on Procurement and Military Nuclear Systems, 97th Cong., 1st Sess. 217 (March 1981)(statement of Maj. Gen. William W. Hoover).

[57] The accidents at the Brown's Ferry and Three Mile Island nuclear plants have led many to criticize previous government assessments and statements regarding the probability of accidents at nuclear reactor facilities. *See, e.g., Report of the President's Commission on the Accident at Three Mile Island* (1979).

[58] The Department of Energy is responsible for, *inter alia,* the design, development, test, production, and retirement of nuclear weapons and surveillance and certification of the reliability of stockpiled weapons. "History of Nuclear Weapons Control," *supra* note 55, App. A, at A-2-2. *See also Loading and Underway Replenishment of Nuclear Weapons, supra* note 50, at 2-1.

One of the minimum criteria is that "nuclear explosives not known to be one-point safe will not be transported offsite." DOE Order 5610.0, Sept. 11 1979. "One-point safe" explosives are those which have less than one chance in a million of achieving a nuclear yield if the high explosive is accidentally detonated.[59] In addition, the Department of Energy, as well as its predecessor agencies, the Atomic Energy Commission and the Energy Research and Development Administration, has conducted numerous safety tests of nuclear weapons, to determine the size of a nuclear explosion in the event of an accident.[60] Some of these tests had nuclear yields.[61]

There has been at least one accidental detonation of the high explosive components for nuclear weapons at an Atomic Energy Commission storage facility in Medina Base, Texas in 1963.[62] Under the Department of Energy's Stockpile Improvement Program, several nuclear weapons in the existing inventory will be upgraded by incorporating new high explosive materials which are more resistant to detonation in abnormal

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[59] The following definitions are set forth in DOE Order 5610.0 (Sept. 11, 1979):

Nuclear Explosive: Any assembly or subassembly containing fissile and/or radioactive materials and high explosives, propellants, or other means capable of producing a nuclear detonation.

. . . .

One-Point Safe Nuclear Explosive: Those nuclear explosives which in the event of a detonation initiated at any one point in the high explosive system presents no greater probability than 1 in 10^6 of achieving a nuclear detonation.

[60] W. Langham, *et al, Plutonium Dispersal by Accidental or Experimental Low-Order Detonation of Atomic Weapons* 39 (LA-1981 revised ed.) [hereinafter cited as "Los Alamos Report"]. *See also* U.S. Dept. of Energy, "Tests Conducted between September 12, 1958 and October 30, 1958 — Operation Hardtack II," *In Announced United States Nuclear Tests July 1945-December 1980,* NVO-209, Rev-1, 9-10 (Jan. 1981).

[61] Nuclear yields associated with safety experiments during Operation Hardtack II ranged up to 115 tons of TNT equivalent.

[62] U.S. Dept. of Defense, *Narrative Summaries of Accidents Involving U.S. Nuclear Weapons 1950-1980, supra* note 54, at 23.

environments such as fires and airplane crashes, and which would reduce the danger of radioactive releases.[63]

This discussion indicates not only that there exists a risk of a nuclear accident in a storage facility such as West Loch, but that the magnitude of the risk can be discussed in a meaningful manner using information already in the public record.[64]

(2) The Enhancement of the Risk of Nuclear Accidents by the Physical Proximity of the Airports

The location of the West Loch facility near three airports increases the probability of an accidental nuclear explosion because of the increased danger of severe damage to the magazines and fire as a result of an airplane crash. The probability of various levels of radioactive releases associated with airplane crashes into a magazine could be determined by the same mathematical techniques as are routinely employed by the Nuclear Regulatory Commission in assessing nuclear reactor safety.[65]

The EIS on West Loch could, for example, list each type or weight category of aircraft that frequents the airports near West Loch and for each category determine the probability and effects of an airplane crash into a West Loch storage magazine. Similar calculations have been performed by the Nuclear Regulatory Commission in considering the possibility of aircraft

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[63] Proposed Dept. of Energy Authorization Legislation (National Security Programs) for Fiscal Year 1982: Hearings on H.R. 2969 before the Subcomm. on Procurement and Military Nuclear Systems, 97th Cong., 1st Sess. (March 1981). *See also* Statement of Hon. James P. Wade, Jr., Assistant Secretary of Defense (Atomic Energy):

> We must extend our effort to minimize plutonium dispersal hazards. The inclusion of IHE in some weapon systems is a major step toward reducing this hazard. We have asked the DOE to continue investigation of improved safety resulting from [deleted]. We need to address explosive safety for the stockpile as a whole. Additional research in this area is a priority DOD requirement. *Id.*, at 47.

[64] *See generally* Los Alamos Report, *supra* note 60.

[65] *See, e.g.*, U.S. Nuclear Regulatory Commission, "Fault Trees," *Reactor Safety Study* (Appendix II) (1975).

crashes into nuclear power plants located near airports.[66] The presentation of this data in an EIS on West Loch would not necessitate the use of classified material.

(3) The Effects of Any Nuclear Accident Upon the Surrounding Population and Environment of Hawaii

The effects of the accidental release of radioactive materials in the area around West Loch can be described in considerable detail in the unclassified portions of an EIS. Information concerning the types of radioactive materials used in U.S. nuclear weapons is unclassified.[67]

While information concerning the amounts of materials used in nuclear weapons is classified, it is not necessary to specify these amounts in order to discuss the quantity of material which might be released offsite, the ground contamination levels on and offsite, the potential for inhalation of radioactive particles, and the health effects of such inhalation.[68] Nor is it necessary for the Navy to reveal what percentage of the total amount of nuclear materials in weapons stored at West Loch would be released.[69]

Two cases of accidental dispersal of radioactive nuclear weapons materials have been documented. The first involved the crash of a B-52 bomber near Palomares, Spain in 1966, in which the high explosive materials in two of the four nuclear weapons on board exploded on impact with the ground.[70] The second involved the crash and burning of a B-52 bomber at Thule, Greenland in 1968, in which fire destroyed all four nuclear weapons on board.[71] Both cases resulted in widespread radioactive contamination requiring the removal of 1,400 tons of soil and vegetation from Palomares and 237,000 cubic feet of

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[66] *See In re Metropolitan Edison Co.*, 8 N.R.C. 295 (1978).

[67] U.S. Depts. of Defense and Energy, *The Effects of Nuclear Weapons* 12 (3d ed. 1977).

[68] *See, e.g.*, Los Alamos Report, *supra* note 60.

[69] *Id.*

[70] *See Narrative Summaries, supra* note 54, at 29.

[71] *Id.*, at 30. *See* Joint Appendix, at 18.

ice, snow, and water at Thule.[72] The contamination levels and associated decontamination efforts from these two accidents have been extensively discussed in unclassified literature.[73] Ground contamination levels have been reported without revealing the detailed design characteristics of the weapons involved.[74] Similarly, extensive unclassified information on the effects of radioactive fallout from nuclear weapons tests does not reveal classified details of nuclear weapons designs.[75] As evidenced in the record of this case, the Navy could discuss in an unclassified portion of the EIS the health effects associated with the inhalation of plutonium, or arising from exposure to direct radiation and radioactive fallout from a nuclear detonation.[76]

(4) The Effects of Continual Low-Level Radiation from the Storage of the Weapons Near Populated Areas

The Navy has already submitted a Candidate Environmental Impact Statement on nuclear weapons storage which discusses the risks associated with continual low-level radiation from the storage of nuclear weapons near populated areas. In preparing an EIS, the Navy should determine whether it is necessary to supplement the information in the CEIS to address factors specific to West Loch.[77]

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[72] *Id.*, at 29-30. *See* Joint Appendix, at 18.

[73] United Nations Scientific Committee on the Effects of Atomic Radiation, *Ionizing Radiation: Levels and Effects*, Vol. 1.

[74] *Id.*

[75] *See* U.S. Environmental Protection Agency, "Levels and Distribution of Environmental Plutonium Around Trinity Site," ORP/LV-78-3 (Oct. 1978); U.S. Atomic Energy Commission, *Radioactive Fallout from Nuclear Weapons Tests* (1965).

[76] Joint Appendix, at 39-44. This discussion would contain information such as that presented in the Los Alamos Report, *supra* note 60; *The Effects of Nuclear Weapons, supra* note 67; National Academy of Sciences, Committee on Biological Effects of Ionizing Radiation, *The Effects on Population of Exposure to Low Levels of Ionizing Radiation: 1980*, and numerous scientific articles referenced therein.

[77] 40 C.F.R. § 1502.20.

IV. CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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No. 80-1377

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CASPAR W. WEINBERGER, Secretary of Defense, et al.,
Petitioners,

v.

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioners. Consent to the filing of this brief has been granted by counsel for both parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation, organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is established by an independent Board of Trustees composed of concerned citizens, the majority of

whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

This action involves the requirement of preparation and dissemination of a hypothetical environment impact statement (EIS) regarding the alleged storage of nuclear weapons in the West Loch branch of the Lualualei Naval Magazine on the island of Oahu, Hawaii. The requirement of the Ninth Circuit below that an EIS be prepared is directly contrary to statutory requirements and regulations of the Department of Defense which forbid the dissemination of information regarding whether or not a particular site is being utilized for the storage of nuclear weapons.

Amicus is especially concerned as a public interest organization about the practical effects of dissemination of classified information of this nature. The public dissemination of properly classified military secrets under the pretext of a need for public awareness under the requirements of the National Environmental Policy Act (NEPA) would be disastrous in terms of national security. At a time of heightened awareness of the need for an increase in our overall defense posture, such a requirement would allow those who wish to gain access to classified military secrets concerning the storage of nuclear weapons to circumvent the security measures designed to prevent disclosure of such information by merely requesting a copy of an EIS for any given project. To require a publicly disseminated EIS for every military weapon facility that is *capable* of storing nuclear weapons would in effect make public a "road map" of the nuclear arsenals of the United States. Additionally, it would profoundly affect the manner in which decisions are made regarding the development of future military defense facilities, and would require a significant and unnecessary expenditure of tax dollars in order to divulge military secrets at a time when the national policy favors a decrease in federal spending.

SUMMARY OF ARGUMENT

The requirements of NEPA are clear and must be followed by all federal agencies, including the Department of Defense, unless there is an express statutory conflict. In this case, such a conflict exists in that the Atomic Energy Act forbids the public disclosure of information regarding the military use of nuclear weapons. Neither the exception to full disclosure in an EIS contained in the regulations of the Council on Environmental Quality (CEQ) and the Department of Defense, nor the Ninth Circuit's requirement below of preparation and dissemination of a hypothetical EIS, would satisfactorily avoid the prohibition against publication of classified material contained in the Atomic Energy Act.

The practical effect of the Ninth Circuit's requirement of preparation and dissemination of an EIS here is to construe the Navy's secrecy obligation under the Atomic Energy Act so narrowly as to abolish it. Important decisions with regard to our national security should not be hamstrung by the procedural concerns of NEPA. The NEPA process should not be permitted to be used as a shortcut around the Freedom of Information Act, under which classified information may properly be kept secret in the interest of national security. By requiring classified military secrets to be made public, the Ninth Circuit is serving to undermine our national security at a time when public attention is focused on the need for a strengthening of our national defenses. The decision of the court below requires the unnecessary expenditure of tax dollars in order to make public classified military secrets which should properly be kept confidential.

ARGUMENT

I

THE REQUIREMENTS OF THE NATIONAL ENVIRONMENTAL POLICY ACT MUST BE FOLLOWED UNLESS THERE IS A STATUTORY CONFLICT

The requirements of the National Environmental Policy Act of 1969, 42 U. S. C. §§ 4321, *et. seq.*, are clear and unambiguous. Section 102(2)(C) of NEPA provides, *inter alia*, that all federal agencies *shall* prepare a *detailed* statement concerning the environmental impacts of proposed major federal actions. 42 U.S.C. §4332(2)(C). This Court, citing the Conference Report on NEPA, has recognized that the deliberate command imposed by that statute must "not be shunted aside in the bureaucratic shuffle." *Flint Ridge Development Co.* v. *Scenic Rivers Association of Oklahoma*, 426 U.S.776, 787 (1976). Regulations of the Department of Defense provide that NEPA applies to activities of the Department, even if they are of a classified nature. 32 C. F. R. § 214.8(i) (1980).

CEQ, established pursuant to NEPA, has been charged by Executive Order with the duty of preparing regulations to establish guidance for agencies and courts in interpreting and administering NEPA. Executive Order No. 11991 (May 24, 1977). The CEQ regulations appear at 40 C. F. R. §§ 1500-1508 (1980), and require that

> "environmental information [be] available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." *Id.* at Section 1500.1(b).

The regulations require that an EIS "provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives" to the proposed action. *Id.* at Section 1502.1. The EIS shall "rigorously explore and objectively evaluate all reason-

able alternatives, . . . [devoting] substantial treatment to each alternative considered in detail. . . ." *Id.* at Section 1502.14(a) and (b).

However, NEPA provides that agencies are required to comply only "to the fullest extent possible." 42 U. S. C. § 4332. Clearly, NEPA is intended to supplement rather than supplant existing statutory authorizations of federal agencies. *Id.* at Section 4335. The CEQ regulations provide that "[a]gency procedures shall comply with these regulations except where compliance would be inconsistent with statutory requirements . . . ." 40 C. F. R. § 1507.3(b) (1980). This Court has recognized in *Flint Ridge Development* that "NEPA must give way" when there is "a clear and unavoidable conflict" between the provisions of NEPA and other statutory requirements. 426 U.S. at 788. As in *Flint Ridge Development,* the issue in this case is whether the requirement of preparation of a detailed EIS, subject to public disclosure, conflicts with another statutory duty of a federal agency. In this case, the Court must examine whether the requirements of NEPA conflict with the duties of the Secretary of Defense under the Atomic Energy Act of 1946, as amended, 42 U. S. C. §§ 2011, *et seq.*, and the regulations of the Department of Defense.[1]

II

THE REQUIREMENTS OF THE ATOMIC ENERGY ACT PROHIBIT DISCLOSURE OF INFORMATION REGARDING THE MILITARY USE OF NUCLEAR WEAPONS

The Atomic Energy Act defines all information concerning the design, manufacture, or utilization of nuclear weapons as "restricted data," 42 U. S. C. § 2014(y), the dissemination and

[1] This case does *not* present a rehash of the issue presented in *Concerned About Trident* v. *Rumsfeld,* 555 F. 2d 817 (D. C. Cir. 1977), whether NEPA applies to activities involving national defense. That court's position that there is no case law or statutory support for

(Footnote continued on following page)

declassification of which are to be controlled in order to protect the common defense and security. *Id.* at Section 2161. Restricted data relating primarily to the military utilization of nuclear weapons may not be published unless the Department of Defense and the Department of Energy jointly determine "that such data may be published without constituting an unreasonable risk to the common defense and security." *Id.* at Section 2162(c). Such data may be removed from the category of restricted data provided that it can be adequately safeguarded as defense information, and further provided that it is not made available to any nation or regional defense organization, except under limited circumstances. *Id.* at Section 2162(d). Communication of restricted data to unauthorized persons is punishable by fine or imprisonment. *Id.* at Section 2277; 18 U. S. C. § 793.

Information regarding the military use of nuclear weapons is variously classified as "confidential," "secret," and "top secret" in the Nuclear Weapons Classification Guide prepared by the Department of Defense and the Energy Research and Development Administration. *See* Appendix H to Petition for Writ of Certiorari (hereinafter App.). Similar classifications are given to such data in the Navy Security Classification Guide for Nuclear Weapons. *See* App. I. Further, Navy regulations forbid personnel to reveal any information with regard to the presence or absence of nuclear weapons or components at any particular location. *See* App. J.

A. Full Compliance with the National Environmental Policy Act in This Case Would Be Contrary to the Requirements of the Atomic Energy Act and to the Interests of National Security

The CEQ regulations provide that an EIS which addresses classified proposals may be restricted from public dissemination

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(Footnote continued from preceding page)

a national defense exemption from NEPA rested on the fact that the Navy in that case "pointed to no existing specific statutory authority prohibiting compliance with NEPA . . . or making such compliance impossible." *Id.* at 823.

in accordance with agency regulations dealing with classified information. 40 C. F. R. § 1507.3(c) 1980). The Department of Defense recognizes that it must comply with the requirements of NEPA even with regard to activities of a classified nature, but the Department's regulations also provide that preparation and dissemination of an EIS shall be done "in accordance with the requirements applicable to classified information." 32 C. F. R. § 214.8(i) (1980). Clearly, the preparation and dissemination of an accurate and detailed EIS providing a full and fair discussion of significant environmental impacts and a rigorous exploration and objective evaluation of all available possibilities for the proposed activity would satisfy the requirements of NEPA. However, it would also fly directly in the face of the provisions of the Atomic Energy Act which prohibit the public dissemination of information concerning the military use of nuclear weapons in order to assure that the common defense and security are maintained. An EIS prepared to the detail and extent required by NEPA would of necessity discuss matters that are prohibited from public disclosure by statute and regulation in this case. Under the doctrine of *Flint Ridge Development*, the requirements of NEPA must give way to the needs of national defense and security as provided in the Atomic Energy Act.

B. The Exceptions from Full Compliance Would Not Fulfill the Requirements of the National Environmental Policy Act and Would Conflict with the Atomic Energy Act

The CEQ regulations provide an exception to the strict requirement of NEPA for classified proposed activities which are required by statute to be kept secret in the interest of national defense. 40 C. F. R. § 1507.3(c) (1980). This section permits an EIS to be organized in such a manner that classified information can be contained in one or more annexes, so that these portions can be withheld from public dissemination. Similar language appears in the Department of Defense regulations. 32 C.F.R. §214.8(i) (1980). The Ninth Circuit in this case fashioned yet another alternative to the strict requirements of NEPA by requiring a *hypothetical* EIS to generally assess the

impact of storing nuclear weapons at West Loch, without conceding whether nuclear weapons will in fact be stored there. However, neither of these alternatives would satisfy the requirement of the Atomic Energy Act that data concerning the *possibility* of a particular site as a nuclear weapon storage facility not be divulged. A detailed analysis of the environmental consequences of the storage of nuclear weapons at West Loch could not be revealed to the public under the first alternative above until the material required to be kept secret by the Atomic Energy Act was taken out. So much information would have to be excised from the EIS that the end product would be utterly useless for purposes of agency analysis and comment and public dissemination and review. The second alternative would simply be contrary to the Atomic Energy Act, which prohibits the dissemination of classified information concerning the design, manufacture, or utilization of nuclear weapons at any particular site. The Department of Defense has already complied with NEPA in good faith and to the extent possible without jeopardizing our national security by filing a candidate EIS, generally assessing the environmental effects of the storage of nuclear weapons, without reference to any particular site. *See* App. G. Good faith compliance with NEPA is sufficient in matters involving national defense. *E.g., Smith* v. *Schlesinger,* 371 F. Supp. 559, 561 (C. D. Cal. 1974).

III

THE PRACTICAL EFFECTS OF COMPLYING WITH THE NATIONAL ENVIRONMENTAL POLICY ACT IN THIS CASE DEMONSTRATE THAT AN ENVIRONMENTAL IMPACT STATEMENT SHOULD NOT BE REQUIRED

Despite the fact that it has conceded that the Navy is forbidden by the Atomic Energy Act and the regulations implementing the Act to disclose any information regarding the presence of nuclear weapons at particular sites, the Ninth Circuit has required the Navy to prepare a hypothetical EIS. This serves to construe the Navy's secrecy obligation so narrowly as to effectively abolish it, producing a result that

seriously jeopardizes the public interest in national defense. Issues of national defense necessarily involve questions of confidentiality. "Public disclosure relating to military-defense facilities creates serious problems involving national security." *McQueary* v. *Laird*, 449 F. 2d 608, 612 (10th Cir. 1971). The security of the nation must not be jeopardized by those seeking secret information under the guise of environmental concern. Because a hypothetical EIS dealing with this subject area would unavoidably disclose certain information about the potential nuclear capability of this project, the Ninth Circuit's requirement will force the Department of Defense to make the possibility of disclosure an additional factor in deciding when and how to construct weapon facilities.

The executive branch of the government, which has traditionally been at the forefront in matters of national security, must not be permitted to be thwarted in its efforts by the procedural dictates of NEPA. *See McQueary* v. *Laird*, 449 F. 2d at 612. In an address to an American Bar Association conference, then-Chairman of CEQ, Russell W. Peterson, stated in regard to NEPA that

> "[*e*]*xcept for valid reasons of national security*, every major decision by a Federal agency should be open to the public." Keynote Address by Russell W. Peterson, A.B.A. Natural Resources Section Conference on Environmental Protection and Energy Development at 7 (Nov. 6, 1975) (emphasis added).

In fact, the courts have held that when a conflict arises between NEPA and issues of national security, it is the responsibility of the executive branch of the government to weigh the competing factors; the decision is not within the province of the judiciary. *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F. 2d 788, 795 (D. C. Cir.), *aff'd*, 404 U. S. 917 (1971).

If the information at issue here were sought under the Freedom of Information Act (FOIA), 5 U. S. C. § 552, rather than under NEPA, nondisclosure would be justified under either Section 552(b)(1), which exempts from disclosure matters required to be kept secret in the interest of national security,

or under Section 552(b)(3), which permits nondisclosure of matters specifically exempted from disclosure by statute. *See Hayden* v. *National Security Agency/Central Security Service*, 608 F. 2d 1381 (D. C. Cir. 1979), *cert. denied*, 446 U. S. 937 (1980). "In national security cases, some sacrifice to the ideals of the full adversary process are inevitable." *Military Audit Project* v. *Casey*, slip op. at 53, No. 80-1110 (D. C. Cir. May 4, 1981) (FOIA case). The Ninth Circuit below permits the respondents here to do under NEPA what they would be prohibited from doing under FOIA. To affirm that decision would provide a convenient vehicle for circumventing the clear intent of Congress under the very statute designed to control the disclosure or nondisclosure of information to the public, by merely asserting a concern for the environment, be it real or fancied. The NEPA process should not be permitted to be used to short-circuit the FOIA process.

To require the preparation and dissemination of an EIS in this instance would open up a veritable Pandora's Box. It would be folly for the federal government to assure the integrity of our national defense systems by providing an intricate and detailed scheme for the protection of information regarding the nature, presence, capacity, and capability of nuclear weapons and nuclear weapon storage sites, with fine or imprisonment as punishment for unauthorized dissemination of such information, and then to turn around and allow anyone, friend or foe alike, for the cost of a telephone call or a postcard, to have access to such information through his or her own personal copy of an EIS whenever the federal government proposes to undertake an activity involving or potentially involving the military use of nuclear weapons.

The requirement of a hypothetical EIS regarding the storage of nuclear weapons for each and every facility in the country which is *capable* of storing such weapons would serve to pinpoint the precise locations of our nuclear arsenals and would place invaluable defense information concerning possible nuclear weapon storage sites at the disposal of our allies as well as our enemies. The availability of this information to our

adversaries would unquestionably affect the balance of power in favor of those opposed to the free world, at a time when our national policy calls for an *emphasis* on national defense. The national policy favoring an increase in our defense posture comes as a result of the awareness that we have fallen behind our adversaries in terms of our military defense capability. Congressional Research Service, *United States/Soviet Military Balance* (1976). *See, e.g.*, F. Hoeber, W. Schneider, N. Polmar, and R. Bessette, *Arms, Men and Military Budgets* (1980).

The detrimental effect to our national security by requiring disclosure of the information at issue will be compounded by the adverse effect on the national treasury by the required expenditure of funds to comply with the NEPA process. Preparation of a draft and final EIS for a major project including all the required consultation, evaluation, and agency and public comment, is an exhaustive process. *See* W. Rodgers, *Handbook on Environmental Law* § 7.4 at 725-38 (1977). Typically, the entire process can cost hundreds of thousands of dollars. Council on Environmental Quality, *Environmental Quality—1980* 372 (1980) (average EIS cost for 50 wastewater treatment plants was $158,585). In some instances, EIS costs for a particular project can involve multiple studies and run into the millions of dollars. For example, the Trident Submarine Program involved the preparation of at least 27 separate environmental assessments, draft EIS's, candidate EIS's, and final EIS's, which represents a significant drain on the federal treasury. *Concerned About Trident* v. *Schlesinger,* 400 F. Supp. 454, 473 (D. D. C. 1975), *aff'd in part, rev'd in part,* 555 F. 2d 817 (D. C. Cir. 1977). This Court should not allow the expenditure of hard-earned tax dollars in order to divulge classified military secrets to the public.

CONCLUSION

The need for full and fair discussion of the environmental consequences of major federal actions is not a requirement that should be dismissed lightly. However, in *this* case, the requirement of public disclosure under NEPA directly conflicts with the requirement of secrecy contained in the Atomic Energy Act. For all of the above reasons, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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